THE LAW OF EXECUTORS AND ADMINISTRATORS.

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——— SORTE SUPREMA
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HOR.

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PREFACE.

THE ſubject of the following treatiſe comprehends a great variety of points, in which the public are very generally intereſted. In the ordinary courſe of human affairs, almoſt all perſons at ſome period of their lives are called to exerciſe the office of a perſonal repreſentative, or to tranſact buſineſs with ſuch as are inveſted with it. An attempt, therefore, to unfold it's nature, to deſcribe it's rights, and to point out it's duties, as there is no modern work of any reputation which profeſſes excluſively to treat of theſe topics, will, I perſuade myſelf, be regarded with favour.

The book of the moſt diſtinguiſhed merit on this ſubject, is that which is entitled, the

" Office and Duty of Executors;" and which, although it bear the name of Thomas Wentworth, is now generally aſcribed to Mr. Juſtice Dodderidge. It was firſt publiſhed anonymouſly in the year 1641; to the third edition, printed in the ſame year, was prefixed for the firſt time the fictitious name I have juſt mentioned. The eighth edition appeared in 1689, to which Chief Baron Comyns in his Digeſt conſtantly refers. In 1703, the ninth edition was publiſhed, with a Supplement by H. Curſon; the twelfth edition was publiſhed in 1762, with references, by a Gentleman of the Inner Temple, and in 1774, the thirteenth and laſt edition, by Mr. Serjeant Wilſon.

Of the original work it is no undue praiſe to aſſert, that it is worthy the pen of ſo learned an author. It is calculated to engage the attention of the reader, and contains very ſound principles, and authentic information. At the ſame time it muſt be confeſſed, that it is often uncouth, and ſometimes obſcure, in it's language; altoge-

ther

ther inartificial in it's method; and of neceſſity defective in regard to later adjudications, which, eſpecially in equity, are very numerous and important. It is alſo ſilent reſpecting the office of an adminiſtrator. Nor is it much indebted to it's ſeveral editors. The Supplement, as it is called, is a mere collection of caſes, without order, and without preciſion.

Under theſe circumſtances I was induced to compile the preſent treatiſe. The ſubject appeared to me capable of an arrangement, more natural and diſtinct, than any which has hitherto been adopted. Such arrangement I have endeavoured to form, and to preſerve. It has, alſo, been my object to compriſe the multifarious matter, of which I have been treating, within as narrow limits as it would admit; and to expreſs myſelf at once with brevity and clearneſs. The authorities I have ſtated very fully in the margin, with a view of facilitating farther reſearches into points of a nature ſo intereſting, and of ſo

perpetual a recurrence. And it will afford me much ſatisfaction if I ſhall have contributed to extend ſo uſeful a ſpecies of knowledge.

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THE

THE LAW OF EXECUTORS AND ADMINISTRATORS.

BOOK I.

OF THE APPOINTMENT OF EXECUTORS AND ADMINISTRATORS.

CHAP. I.

OF WILLS AND CODICILS—WHO MAY MAKE THEM—WHO NOT—HOW THEY ARE ANNULLED.

BEFORE I enter on the ſubject of this treatiſe, I ſhall ſtate ſome general propoſitions in regard to wills.

A will or teſtament is defined to be the legal declaration of a party's intentions, which he directs to be performed after his death [a].

[a] 2 Bl. Com. 499, 500.

A will may relate either to real, or to perſonal property. In the former caſe, it is denominated a

deviſe, and is conſidered in the light of a conveyance [b]. By the ſtatute of frauds and perjuries, 29 *Car.* 2. *c.* 3. it ſhall not only be in writing, but ſigned by the teſtator, or ſome other perſon in his preſence, and by his expreſs directions, and be ſubſcribed in his preſence by three or four credible witneſſes.

[b] 4 Bac. Abr. 242. 2 Bl. Com. 378. 501.

A will, as it reſpects perſonal property, is of two ſpecies, written, and nuncupative; if of the former, it may be committed to writing either by the teſtator himſelf or by his directions: nor is the ſubſcription of his name to the inſtrument, nor the affixing of his ſeal to the ſame, nor the preſence of witneſſes at its publication, eſſential to its validity; yet it is ſafer and more prudent, and leaves leſs in the breaſt of the eccleſiaſtical judge, if it be ſigned or ſealed by the teſtator, and publiſhed in the preſence of witneſſes [c].

[c] 2 Bl. Com. 501, 502. Vide Com. Rep. 451.

With regard to nuncupative wills, the unqualified allowance of them was found productive of the greateſt frauds, and it became neceſſary to ſubject them to very ſtrict regulations. Accordingly, by the ſtat. 29 *Car.* 2. above mentioned, it is enacted, that no ſuch will ſhall be good where the eſtate thereby bequeathed ſhall exceed the value of 30 l., that is not proved by the oaths of three witneſſes at the leaſt, who were preſent at the making thereof, (who, by the ſtat. 4 & 5 *Ann. c.* 16. muſt be ſuch as are admiſſible on trials at common law), nor unleſs it be proved, that the teſtator, at the time

time of pronouncing the ſame, did bid the perſons preſent, or ſome of them, bear witneſs that ſuch was his will, or to that effect; nor, unleſs ſuch nuncupative will were made in the time of the laſt ſickneſs of the deceaſed, and in his dwelling-houſe, or where he had been reſident for the ſpace of ten days or more, next before the making of ſuch will, except where ſuch perſon was taken ſick, from home, and died before his return; nor, after ſix months paſt after the ſpeaking of the pretended teſtamentary words, ſhall any teſtimony be received to prove any will nuncupative, except the teſtimony or the ſubſtance thereof were committed to writing within ſix days after the making of the ſaid will.

Soldiers in actual military ſervice, and mariners or ſeamen at ſea, are exempted from the proviſions of this act. The former may at this day make nuncupative wills, and diſpoſe of their goods, wages, and other perſonal chattels, without thoſe forms and ſolemnities which the law requires in other caſes [d].

[d] 1 Bl. Com. 417. Stat. 29 Car. 2. c. 3. ſ. 23. 5 W. 3. c. 21. ſ. 6.

But, with reſpect to the latter, this licenſe no longer exiſts. The perpetual impoſitions practiſed on this meritorious and unſuſpecting body of men, induced the legiſlature to adopt a new policy, and to diveſt them of a privilege, which, inſtead of being beneficial to them, was perverted to purpoſes the moſt injurious.

Many ſalutary regulations are accordingly preſcribed by the ſtatutes 26 *Geo.* 3. *c.* 63. and 32 *Geo.* 3. *c.* 34. in regard to the making and probate of the wills of petty officers and ſeamen in the king's ſervice, and of non-commiſſioned officers of marines, and marines, ſerving on board a ſhip in the king's ſervice, which I ſhall defer ſpecifying till I treat of probates.

A codicil is a ſupplement to a will, annexed to it by the teſtator, and to be taken as part of the ſame, either for the purpoſe of explaining or altering, or of adding to, or ſubtracting from, his former diſpoſitions [c].

[c] 2 Bl. Com. 500. Swinb. Part 1. ſ. 5.

A codicil may be annexed to the will either actually or conſtructively. It may not only be written on the ſame paper, or affixed to or folded up with the will, but may be written on a different paper, and depoſited in a different place.

A codicil may be annexed either to a deviſe of lands, or to a will of perſonal eſtate. To alter the former, a codicil muſt by the ſtatute of frauds be in writing, and ſigned by the deviſor in the preſence of three, or four witneſſes declaring the ſame [f]. To a will of perſonal eſtate it may be either written or nuncupative, provided, in caſe of its being the latter, it merely ſupply an omiſſion in the inſtrument. Therefore A. having diſpoſed of part of his effects by his will in writing, may diſpoſe of the reſidue

[f] 1. P. Wms. 344, & Not. 1. ibid. vid. Dougl. 244. Not. 2.

reſidue by a nuncupative codicil [g]. But by the ſame ſtatute ſuch codicil ſhall not operate to repeal or alter a will. A written codicil reſpecting perſonal eſtate is authenticated in the ſame manner as a will of ſuch property.

[g] Com. Dig. Devife (C.) Raym. 334.

A will may be avoided or annulled, 1ſt, by the incapacity of the party making it; 2dly, by the making of another of a later date; 3dly, by cancelling or revoking it [h].

[h] 2 Bl. Com. 502.

There are three grounds of incapacity: the want of ſufficient legal diſcretion; the want of liberty or free will; and the criminal conduct of the party [i].

[i] 2 Bl. Com. 496, 497.

To the firſt are ſubject all infants under the age of fourteen, if males, and twelve if females [k]; after that period their incapacity ceaſes; although, on the one hand, it has been ſtrangely aſſerted, that an infant of any age, even of four years old, may make a teſtament [l]; and on the other, he has been denied before eighteen, to be competent [m]; yet this, as a matter of eccleſiaſtical cognizance, muſt be determined by the eccleſiaſtical law, which has preſcribed the rule as above ſtated [n].

[k] Off Ex. 213, 214. Harg. Co. Litt. 89 b. Note 6.

[l] Perkins ſ. 503; but that ſeems an error of the preſs for 14. Vide Harg. Co. Litt. 89 b. Note 6.

[m] Harg. Co. Litt. 89 b.

[n] 2 Bl. Com. 497. Harg. Co. Litt. 89 b. Note 6.

But, if the teſtator, of whatever age, were not of ſufficient capacity, that will invalidate his teſtament. Perſons afflicted with madneſs, or any other mental diſability, ideots or natural fools, or thoſe whoſe intellects are deſtroyed by age, diſtem-

per, or drunkenneſs, all theſe, are incapable of making a will during the exiſtence of ſuch diſability. In this claſs, alſo, may be ranked thoſe perſons, who, having been born deaf and blind, have ever wanted the common ſources of underſtanding [o]. But a will is not affected by the ſubſequent inſanity of the teſtator [p].

[o] 2 Bl. Com. 497.

[p] 4 Co. 60.

In reſpect to the incapacity ariſing from the want of liberty or freedom of will, priſoners, captives, and the like, are not by the law of England abſolutely diſabled to make a teſtament; but the court has a diſcretion of judging, whether, from the ſpecial circumſtances of dureſs, ſuch act ſhall be conſtrued involuntary. But a married woman has no power either of deviſing lands, or of bequeathing chattels. Her perſonal chattels belong abſolutely to the huſband. He may alſo diſpoſe of her chattels real, and he ſhall have them to himſelf in caſe he ſurvive. An intereſt which neceſſarily precludes her from ſuch an alienation [q]: yet by the licenſe of the huſband, ſhe may make a teſtament, and, on marriage, he frequently covenants with her friends to allow her that privilege [r]. So, where he ſtipulates that perſonal property ſhall be enjoyed by the wife ſeparately, it muſt be ſo enjoyed with all its incidents, one of which is the power of diſpoſition [s]. And where ſhe has ſuch power over the principal, it extends alſo to its produce, and accretions [t].

[q] 2 Bl. Com. 497, 498. 4 Co. 51. 34 & 35 Hen. 8. c. 5. f. 14.

[r] Dr. & Stud. D. 1. c. 7. 4 Bac. Abr. 244. Vide Stra. 891.

[s] 4 Bac. Abr. 244. in not. 3 Bro. Ch. Rep. 8.

[t] 2 Vern. 535. Prec. Ch. 44. 255.

But

But where a feme covert, in conſequence of ſuch licenſe, makes a writing in nature of a will, it ſeems not in a ſtrict legal ſenſe to operate as a will, but as an appointment, yet it is ſo far teſtamentary, that it muſt be proved in the ſpiritual court, before her legatee ſhall be entitled [u].

[u] 3 Atk. 156. 1 Burr. 431. 2 Bro. Ch. Rep. 392. Stone v. Forſyth, Dougl. 707. Vide alſo 2 P. Wms. 624. 2 Veſ. 75. 612.

If the huſband be baniſhed for life by act of parliament, the wife is entitled to make a will [x]. So, where perſonal property is given to a married woman, for her ſole and ſeparate uſe, ſhe may diſpoſe of it by will, without the aſſent of her huſband [y].

[x] 4 Bac. Abr. 244. 2 Vern. 104.

[y] 3 Bro. Chan. Rep. 8.

A feme covert may alſo make a will of effects, of which ſhe is in poſſeſſion in *auter droit*, in a repreſentative capacity; for they never can be the property of the huſband [z]. So, if ſhe has any pin money, or ſeparate maintenance, it ſeems, ſhe may bequeath the ſame without his controul [a].

[z] Off. Ex. 87. Godolph. 1. 10. 11 Vin. Abr. 141.

[a] Prec. Chan. 44.

The queen conſort has a general right to diſpoſe of her perſonal eſtate by will, without the conſent of her lord [b].

[b] Harg. Co. Litt. 133.

Perſons incompetent by their crimes are all traitors and felons, without benefit of clergy, from the time of their conviction and attainder, or outlawry, which amounts to the ſame; for then their property is no longer at their own diſpoſal, but is altogether forfeited [c].

[c] 2 Bl. Com. 499. 4 Bl. Com. 380, 381. Bac. Abr. tit. Outlawry. 2 Hale P. C. 205. Godolph. p. 1. c. 12. ſ. 8.

Nor shall the will of a *felo de se*, so far as it respects goods and chattels, have any operation; for they are forfeited by the act and manner of his death; but he may devise his lands, for of them no forfeiture is incurred [c]. As may also a party, guilty of felony, not punishable with death, for he forfeits only his goods and chattels [d].

[c] Plowd. 261. Swinb 106. 4 Bac. Abr. 247.
[d] 4 Bl. Com. 97. Co. Litt. 391.

Outlaws also, though merely in civil cases, are intestable, in respect to their personal property, while their outlawry subsists; for their goods and chattels are forfeited during that time [e].

[e] Fitzh. Abr. tit. Defcent, 16. 1 Salk. 109.

As for persons, guilty of other crimes inferior to felony, as usurers and libellers, they are not precluded from making testaments [f]; nor, as it seems, is a party excommunicated [g].

[f] Godolph. p. 1. c. 12.
[g] Off. Ex. 17.

An alien, with whose country we are at war, if he have not the king's license to reside here, express or implied, is, by our law, incapable of making a will; but, if he have such license, he, as well as an alien friend, may bequeath his personal estate [h].

[h] 1 Bl. Com. 372. 1 Lutw. 34. 1 Wooddes 374.

Secondly, a will may be avoided, by duly making another of a subsequent date. No will has any operation till after the death of the testator; and, therefore, if there be many such instruments, the last shall vacate all the former [i]. But the republication of a former will, shall supersede one of a later date, and re-establish the first [k]. The

[i] Litt. f. 168. Perk. f. 78.
[k] Perk. f. 479. 4 Burr. 2544. Vid. Dougl 40.

making

making of a subsequent codicil does not invalidate the former, unless it appear to be so intended. Codicils, however numerous, may be all effectual [l].

[l] Swinb. Part. 1. s. 5. 1 Show. 549.

The third mode of avoiding a will is by burning, cancelling, tearing, or obliterating the same, by the testator, or in his presence, and by his direction and consent, or by an express or implied revocation of it.

Although a testator has made a will irrevocable in the strongest terms, yet he is at liberty to revoke it; for he shall not, by his own act or expressions, alter the disposition of law, so as to make that irrevocable, which is of an opposite nature [m].

[m] 8 Co. 82.

A will may be expressly revoked by another will, or by a codicil in writing, either of which in case it relate to real property, must, by the statute of frauds, be signed by the devisor in the presence of three or four witnesses declaring the same [n]. But by the same statute no will in writing of personal estate shall be repealed or altered by parol or will nuncupative, unless the same be committed to writing in the testator's life, and afterwards read to and allowed by him, and proved so to be by three witnesses at the least.

[n] Vid. Dougl. 35. 1 P. Wms. 343.

A will, whether of the former or the latter kind of property, may be revoked also by implication; as, if a testator, after the making of his will, marries, and hath a child, this is a constructive revocation of the will which he made in a state of celibacy;

celibacy [o]; so marriage, and the birth of a posthumous child, afford the same inference; or rather in such cases a tacit condition is presumed to have been annexed to the will at the time of making it, that the party did not then intend that it should take effect if a total change should happen in the situation of his family [p]. But the presumption, like all others, may be rebutted by every sort of evidence [q].

[o] Lord Raym. 441. 1 P. Wm. 304.

[p] 5 Term Rep. 49.

[q] Brady v. Cubitt. Dougl. 31.

If a single woman make a will, her subsequent marriage shall alone revoke it [r]; nor shall it be revived by the death of her husband [s].

[r] 4 Co. 60. 2 P. Wms. 624

[s] 2 Term Rep. 695.

But it has never been decided, that the marriage of a *man*, without the birth of issue, shall amount to a revocation [t]. The subsequent birth of a child shall not, of itself, have that effect [u].

[t] 2 Wooddes 373. Yet it is so laid down by De Grey C. J. 3 Wilf. 516. Sed vid. 5 Term Rep. 52. in not.

[u] 5 Term Rep. 51. in not.

CHAP.

CHAP. II.

OF THE APPOINTMENT OF EXECUTORS.

SECT. I.

Who may be an executor—who not—how he may be appointed.

AN executor is he, to whom the execution of a laſt will and teſtament of perſonal eſtate, is by the teſtator's appointment confided [a].

[a] Off. Ex. 2. 2 Bl. Com. 503.

In general, all perſons are capable of ſuſtaining this character; but there are ſome exceptions, which I ſhall preſently mention.

The king, it ſeems, may be appointed an executor, but in that caſe, as he is preſumed to be ſo engaged in public affairs, as to have no leiſure to attend to the private concerns of individuals, he has a right to nominate perſons to execute the truſt for him, as well as auditors to whom ſuch nominees ſhall account [b].

[b] 3 Bac. Abr. 5. 11 Vin. Abr. 54. 4 Inſt. 335.

It was formerly a doubt, whether corporations aggregate could be conſtituted executors, inaſmuch as they cannot take an oath for the due execution of the office [c]; but it now ſeems ſettled in the affirmative [d], and that on their being ſo named, they may appoint perſons ſtyled Syndics, to receive adminiſtration

[c] Off. Ex. 17. 1 Bl. Com. 477.

[d] 1 Roll. Abr. 915. Swinb. 5. ſ. 1. 3 Bac. Abr. 5. 11 Vin. Abr. 140.

miniſtration with the will annexed, who are ſworn like all other adminiſtrators [e]. Such corporations as can take the oath of an executor are clearly competent [f].

An infant may be appointed an executor [g], and even a child *in ventre ſa mere*, and then if the mother be delivered of two or more children at the birth, they ſhall all be entitled [h]. But an infant, although appointed, is by ſtat. 38 *Geo.* 3. *c.* 87. *ſ.* 6. diſqualified from acting in the executorſhip, till he attains the full age of twenty-one years, and an adminiſtrator is ſubſtituted to act for him in the interval. Before the paſſing of this act, the law deemed him capable of executing the truſt at the age of ſeventeen [i].

A feme covert is alſo capable of the office of an executrix, but not without the conſent and concurrence of her huſband [j]; and although ſhe be an infant, if her huſband be of age and aſſent, he ſhall have the execution of the will [k].

An alien friend may be an executor [l], and ſo alſo may an alien enemy, who came here with a ſafe-conduct, or is commorant here by the king's licenſe, and under his protection, although he came without a ſafe-conduct [m]. Neither outlawry, nor attainder, incapacitates a party, for he acts *in auter droit*, and for the benefit of the deceaſed [n]. Nor had villenage, during its exiſtence in this country, that effect [o].

Nor

[e] 1 Bl. Com. 28. n. 3 Bac. Abr. 5.
[f] Godolph. 85. 3 Bac. Abr. 5.
[g] Off. Ex. 214. 3 Bac. Abr. 8. 2 Bl. Com. 503.
[h] Godolph. 102. 3 Bac. Abr. 8.
[i] Off Ex. 214. 11 Vin. Abr. 99.
[j] 3 Bac. Abr. 9. Off. Ex. 203. 2 Bl. Com. 503. Sed vide 1 Fonbl. 86.
[k] Off. Ex. 215.
[l] Off. Ex. 15. 3 Bac. Abr. 6.
[m] 1 Bac. Abr. 5. 137. Co. Litt. 129 b. Salk. 46. pl. 1. Ld. Raym. 282. Lutw. 34.
[n] Off. Ex. 16. 3 Bac. Abr. 5. Co. Litt. 128.
[o] Swinb. 5. ſ. 1. 3 Bac. Abr. 5. Roll. Abr. 915. 11 Vin. Abr. 141.

Nor is poverty, nor even insolvency, a disqualification of him in whom the testator has chosen to repose so great a confidence [p].

[p] 3 Bac. Abr. 7. Salk. 36. pl. 1. 299. pl. 11. Lord Raym. 361. 11 Vin. Abr. 143. 3 P. Wms. 338. Note B.

A disability, however, may arise in various modes, either from the party's being guilty of certain offences against the established religion; or from his being the subject of an enemy's country, and resident within it, or resident here without the king's license; or from a defect of understanding.

A person excommunicated is suspended from acting till absolution [q]. By stat. 3 *Jac.* 1. *c.* 5. *s.* 22. a popish recusant, convicted at the time of the testator's death, is altogether incompetent [r].

[q] 1 Off. Ex. 17. 107. 3 Bac. Abr. 6. 2 Burn's Eccl. Law, 222.

[r] 1 Show. 293. 11 Vin. Abr. 142. 144. See 4 Bl. Com. 56. & stat. 3 Jac. 1. c. 5. s. 10. & 30 Car. 2. stat. 2. c. 1.

By stat. 3 *Car.* 1. *c.* 2. *s.* 1. if any person send another abroad, to be educated in the popish religion, or to reside in any religious house abroad, for that purpose, or contribute to his maintenance when there, both the sender, the sent, and the contributor, are subject to the same disability. But by virtue of the stat. 31 *Geo.* 3. *c.* 32. Roman Catholics, who shall make, take, and subscribe the declaration of their religious profession, and the oath of allegiance and abjuration, as appointed by that act, shall be exempt from this, as well as other disabilities.

By stat. 9 & 10 *W.* 3. *c.* 32. persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be

true, or the Holy Scriptures to be of divine authority, ſhall, for the ſecond offence, among other incapacities, be diſabled from being executors.

[r] Stat. 25 Car. 2. c. 2. 1 Geo. 1. Stat. 2. c 13. Vide alſo 13 W. 3. c. 6. ſ. 6.

Alſo, by the ſtatutes preſcribing the qualifications for offices, perſons not having taken the oaths and complied with the other requiſites for qualifying, who ſhall execute their reſpective offices after the time limited for the performance of thoſe acts, ſhall incur the ſame incapacity.

Alienage with relation to a hoſtile country, accompanied with reſidence abroad, or reſidence here without the king's permiſſion, either expreſs or implied, is to be claſſed as a ſpecies of diſability; for, although the caſes in reſpect to the incapacity of alien enemies are not entirely uniform [s], yet this principle of excluſion, thus modified, ſeems clearly to exiſt [t].

[s] 3 Bac. Abr. 6. 1 Bac. Abr. 5. 137. Cro. Eliz. 683. Moore 431. Carter 49. 191. Skin. 370. Molloy, lib. 3. c. 2. ſ. 10. Off Ex. 15. Cro. Eliz. 142.

[t] Lord Raym. 282. Stra. 1082. Brandon v. Nesbitt. 6 Term Rep. 23. Brittow v. Towers. 6 Term Rep. 35.

Ideots, and thoſe who are viſited with inſanity, or whoſe intellects are deſtroyed by age, diſeaſe, or intemperance; ſuch perſons as having been born blind and deaf, have always wanted the common inlets of knowledge, are all neceſſarily incapable of the office [u].

[u] 3 Bac. Abr. 7.

The authority of an executor, as appears by the definition, is grounded on the will, and may be either expreſs, or implied; abſolute, or qualified; excluſive, or in common with others.

He

He may be expreſsly nominated either by a written or by a nuncupative will [x].

[x] Off. Ex. 7. 3 Bac. Abr. 28. 11 Vin Abr. 136.

He may be conſtructively appointed merely by the teſtator's recommending or committing to him the charge of thoſe duties which it is the province of an executor to perform, or by conferring on him thoſe rights which properly belong to the office, or by any other means from which the teſtator's intention to inveſt him with that character may be diſtinctly inferred. As if a will directs that A. ſhall have the teſtator's perſonal property after his death, and after paying his debts ſhall diſpoſe of it at his own pleaſure; or declares that A. ſhall have the adminiſtration of the teſtator's goods; this alone conſtitutes A. an executor according to the tenour. So, where the teſtator, after giving various legacies, appointed that his debts and legacies being paid, his wife ſhould have the reſidue of his goods, on condition that ſhe gave ſecurity for the performance of his will: this was held to be ſufficient to make her executrix. And ſo where an infant was nominated executor, and A. and B. overſeers, with this direction, that they ſhould have the controul and diſpoſition of the teſtator's effects, and ſhould pay and receive debts till the infant came of age; they were held to be executors in the mean time [y].

[y] 2 Bl. Com. 503. Off. Ex. 8, 9. Dyer co. 3. Bac. Abr. 27. 11 Vin. Abr. 136. Godolph. 84. Com. Dig. Adminiſtration (B.) Cro. Eliz. 48. Ambl. 364.

His appointment may be either abſolute or qualified. It is abſolute when he is conſtituted certainly, immediately, and without any reſtriction in regard to

to the teſtator's effects or limitation in point of time. It may be qualified, as where A. is appointed to be executor at a given period after the teſtator's death; or where he is appointed executor on his coming of age, or during the abſence of J. S.; or where A. and B. are made executors, and B. is reſtricted from acting during A.'s life; or where A. and B. are named executors, and if they will not accept the office, then C. and D. are ſubſtituted in their room; or where A. is appointed executor on condition that he gives ſecurity to pay legacies, or generally to perform the will. So a teſtator may make A. an executor in reſpect to his plate and houſehold goods, B. in reſpect to his cattle, C. as to his leaſes, and D. in regard to his debts; or appoint A. an executor for his effects in one county, and B. executor for his effects in another, or (which ſeems more rational and expedient) he may ſo divide the duty where his property is in various countries. So he may nominate his wife executrix during the minority of his ſon, or ſo long as ſhe continues a widow [z].

[z] Off. Ex. 10—12. 3 Bac. Abr. 28—30. 11 Vin. Abr. 136. 138, 139.

Laſtly, an executor may be appointed ſolely, or in conjunction with others; but in the latter caſe, they are all conſidered by the law in the light of an individual perſon [a].

[a] 3 Bac. Abr. 30. Off. Ex.

SECT.

SECT. II.

Of an executor de ſon tort—*how a party becomes ſo.*

HAVING thus treated of executors regularly conſtituted, I proceed now to the conſideration of another ſpecies of them, who derive no authority from the teſtator, but who aſſume the office by their own intruſion and interference. Such a one is ſtyled an executor *de ſon tort*, or an executor of his own wrong [y].

Various are the acts, which conſtitute an executor of this deſcription [z], ſuch as his taking poſſeſſion of, and converting the aſſets to his own uſe [a]; paying the deceaſed's mortgages, or other debts or legacies out of them; ſuing for, receiving, or releaſing the debts due to the eſtate [b]; ſeizing a ſpecific legacy without the aſſent of the lawful executor [c]; entering on a leaſe or term for years [d], or an eſtate *pur auter vie* [e], (which is made aſſets by ſtat. 29 *Car.* 2. *c.* 3.) eſpecially, if he enter in right of the deceaſed, and does acts on the land, which belong to the office of an executor, as turning the cattle upon it; delivering to the widow more apparel than is ſuitable to her rank [f]; anſwering in the character of an executor to any action brought againſt him, or pleading any other plea than *ne unques* executor [g]. And all other acts of a ſimilar nature, however ſlight [h], may have the ſame conſequence, as in one caſe, merely taking a bible,

[y] Off. Ex. 172. 3 Bac. Abr. 20. Swinb. 6. ſ. 22. N° 2. 2 Bl. Com 507. 11 Vin. Abr. 210.

[z] 3 Bac. Abr. 21. 11 Vin. Abr. 205.

[a] 5 Co. 33. b. Off Ex. 172. 11 Vin. Abr. 210, 211.

[b] Swinb. 6. ſ. 22. N° 2. Dyer 105. Roll. Abr. 918.

[c] 3 Bac. Abr. 21. Godolph. 91.

[d] Swinb. 6. ſ. 22. N° 2. 3 Bac. Abr. 22.

[e] Carth. 166.

[f] Off. Ex. 175.

[g] 3 Bac Abr. 21. Godolph. 92.

[h] 2 Term Rep. 100. Dyer 166 b. 11 Vin. Abr. 212.

and in another a bedſtead[i], were held ſufficient, inaſmuch as they are the *indicia* of the perſon ſo interfering being the repreſentative of the deceaſed. So if J. S. be appointed by the ordinary to collect the effects, and he exceed his authority, and ſell any of them, even ſuch as are periſhable[j]; or if he had the expreſs direction of the ordinary for ſuch ſale, the ſame being illegal, he becomes an executor *de ſon tort*[k].

[i] 3 Bac. Abr. 24. Noy. 69.

[j] Off. Ex. 174.

[k] Off. Ex. 175. 11 Vin. Abr. 209.

So where A. the ſervant of B. ſold goods of C. an inteſtate both before and after C.'s death, in conſequence of orders given by him in his life-time, and paid the money ariſing from ſuch ſale into the hands of B.; and D. had alſo, in the capacity of a ſervant, ſold other goods of the inteſtate, on an action brought againſt B. and D. as executors, for a debt due from the deceaſed, they not having diſcharged themſelves by payment of the money, which they had reſpectively received to the rightful adminiſtrator at the time when the action was commenced, or even when they pleaded, were both adjudged liable as executors of their own wrong[l].

[l] Padget v. Prieſt et al. 2 Term Rep. 97.

So where a creditor took an abſolute bill of ſale of the goods of the debtor, but agreed to leave them in his poſſeſſion for a limited time, before the expiration of which the debtor died, and the creditor took and ſold the goods; he was held liable to the extent of their value, as executor *de ſon tort*, for the debts of the deceaſed[m].

[m] Edwards v. Harben, 2 Term Rep. 587.

So

So by ſtat. 43 *Eliz. c.* 8. if adminiſtration by fraud be granted to an inſolvent perſon, who gives any of the effects to A. or releaſes a debt due from him to the inteſtate, A., for ſo much, ſhall be executor *de ſon tort* [n].

[n] Vid. Off. Ex. 182, 183.

But there are many acts which a ſtranger may perform without incurring the hazard of being involved in ſuch an executorſhip [o]; ſuch as locking up the goods; directing the funeral, in a manner ſuitable to the eſtate which is left, and defraying the expences of ſuch funeral himſelf, or out of the deceaſed's effects [p]; making an inventory of his property [q]; advancing money to pay his debts or legacies [r]; feeding his cattle; repairing his houſes; providing neceſſaries for his children [s]; for theſe are offices merely of kindneſs, and charity.

[o] 3 Bac. Abr. 22. Godolph. 93, 94.

[p] Off. Ex. 174. Swinb 6. ſ. 22. N° 2. 2 Bl. Com. 507. 11 Vin. Abr. 207.

[q] Swinb. ibid.

[r] 3 Bac. Abr. 22 Godolph. 92.

[s] Swinb. ibid.

And, although, as I have ſtated, a party may be executor *de ſon tort* of a term actually ſubſiſting, and in that caſe cannot enlarge his eſtate by claiming a fee, yet if he enters generally on lands, of which there is no term in being, he cannot qualify his wrong by expreſsly claiming only a particular eſtate, but muſt be a diſſeiſor in fee, and not an executor *de ſon tort* [t]. Nor can there, generally ſpeaking, be ſuch an executor, when there is a rightful executor, or where adminiſtration has been duly granted; for, if after probate of the will, or adminiſtration granted, a ſtranger take poſſeſſion of the property, he may be ſued as a treſpaſſer by the executor or adminiſtrator; but it

[t] 3 Bac. Abr. 23, 24. 3 Lev. 31. 35. 3 Mod. 90. 2 Show. 457.

is otherwiſe if, after taking ſuch poſſeſſion, he claims to be executor, pays or receives debts, or pays legacies, or otherwiſe intermeddles in that character [u], for, in all thoſe caſes, he becomes an executor of his own wrong.

[u] 3 Bac. Abr. 22. 5 Co. 33 b. Salk. 313. pl. 19. 11 Vin. Abr. 212.

Whether a man has made himſelf ſuch an executor, is a queſtion not to be left to a jury, but is a concluſion of law reſulting from the facts eſtabliſhed in evidence [x].

[x] 2 Term Rep. 99.

SECT. III.

Of the renunciation or acceptance of an executorſhip.

AN executor may, if he pleaſes, decline to act, but he has no power to aſſign the office [a]. On his being cited by the ordinary, purſuant to ſtat. 21 *H.* 8. *c.* 5. to come in and prove the will, if he neglect to appear, he is puniſhable by excommunication for a contempt [b]. If he appear, either on citation or voluntarily, and pray time to conſider whether he will act or not, the ordinary may, though the practice ſeems now obſolete, grant letters *ad colligendum* in the interim [c]: If he refuſe, he cannot be compelled to accept the executorſhip, and his renunciation is entered and recorded in the ſpiritual court before the ordinary. A refuſal, by any act *in pais*, as a mere verbal declaration to that effect, is not ſufficient; but, to give it

[a] 3 Bac. Abr. 42.

[b] Off. Ex. 37.

[c] Cro. Eliz. 92.

it validity, it must be thus solemnly entered, and recorded, and then administration with the will annexed will be granted to another [d].

[d] Off. Ex. 38. 4 Burn Eccl. L. 198. Swinb. 6. f. 12. Roll. Abr. 907.

If the executor refuse to take the usual oath, or, being a quaker, to make the affirmation, this amounts to a refusal of the office, and shall be so recorded [e].

[e] 4 Burn Eccl. L. 213. Ld. Raym. 363.

In case the ordinary himself is nominated executor, he may renounce before the commissary [f].

[f] Off. Ex. 38.

If a party renounce in person, he takes an oath, that he has not intermeddled in the effects of the deceased, and will not intermeddle therein with any view of defrauding the creditors. But he may renounce by proxy, and then the oath is dispensed with.

An executor cannot in part refuse; he must refuse entirely, or not at all [g].

[g] 11 Vin. Abr. 139. Brownl. 82. 1 Salk. 297.

After such refusal, and administration granted, the party is incapable of assuming the executorship [h] during the lifetime of such administrator; but, after the death of the administrator, the executor may retract his renunciation, however formally made; but if administration be committed in consequence merely of his failure to appear on the above mentioned process, he has a right, at any future time, even in the administrator's lifetime, to come in and prove the will [i].

[h] Swinb. 6. f. 12. 3 Bac. Abr. 42, 43. Off. Ex. 39.

[i] Off Ex. ibid. Com. Dig. Admon. (B. 4.)

If he appear, and take the uſual oath before the ſurrogate, he has made his election, and cannot afterwards diveſt himſelf of the office, but may be compelled to perform it [k].

[k] Swinb. 6. ſ. 12. 1 Ventr. 335. 11 Vin. Abr. 207.

So if he once adminiſters he is abſolutely bound [l]; and by ſtat. 37 *Geo.* 3. *c.* 90. *ſ.* 10. if he adminiſter, and omit to take probate within ſix months after the death of the deceaſed, he is liable to the penalty of fifty pounds [m].

[l] 4 Burn's Eccl. L. 198. Swinb. 6. ſ. 12. Salk. 301. 304. 307.

[m] Vid. infr.

The acts which amount to an adminiſtration are all ſuch as indicate an election of the executorſhip [n], and within this claſs all ſuch acts as conſtitute an executor *de ſon tort* are of courſe comprehended [o]. Hence it hath been adjudged that if he take the goods of a ſtranger, under an idea that they belonged to the teſtator, and with an intent to adminiſter them, this act is ſufficient to charge him; as, where the teſtator was tenant at will of certain goods, and the executor ſeized them, ſuppoſing they were part of the deceaſed's effects, and intending to adminiſter them, this was held to be an election of the office [p]. But it is otherwiſe if the executor takes the teſtator's goods on a claim of property in them himſelf, although it afterwards appear that he had no right, ſince ſuch claim is expreſſive of a different purpoſe from that of adminiſtering as executor [q]. So if an executor ſequeſter goods in the character of a commiſſary, that is no aſſent to the executorſhip [r].

[n] 3 Bac. Abr. 44. Roll. Abr. 917. 11 Vin. Abr. 205.

[o] 3 Bac. Abr. 44. Roll. Abr. 917.

[p] Roll. Abr. 917. 11 Vin. Abr. 206.

[q] 3 Bac. Abr. 44. Roll. Abr. 917.

[r] Roll. Abr. 917. 11 Vin. Abr. 206.

But

But if there be two executors, and one of them hath a ſpecific legacy bequeathed to him, and takes poſſeſſion of it without the conſent of his co-executor, ſuch act amounts to an adminiſtration [s]. So if an executor hath refuſed before the ordinary, and adminiſtration hath been granted, if it appear he had adminiſtered before, and thus determined his election, the letters of adminiſtration may be revoked, and he may be inforced to prove [t].

[s] Roll. Abr. 917. 11 Vin. Abr. 206.

[t] Off. Ex. 40.

If there be ſeveral executors, they muſt all duly renounce before adminiſtration with the will annexed can be granted [u].

[u] Roll. Abr. 907.

If ſome of them renounce before the ordinary, and the reſt prove the will, the renunciation is not peremptory; ſuch as refuſed may, at any ſubſequent time, come in and adminiſter, and although they never acted during the lives, they may aſſume the execution of the will after the death, of their co-executors, and ſhall be preferred before any executor appointed by them [v]. And if adminiſtration be committed before a refuſal by the ſurviving executor, ſuch adminiſtration will be void [w].

[v] 5 Co. 28. 9 Co. 36. Dyer 160. Salk. 311. pl. 15. 3 P. Wms. 251. Vid. alſo, Burr. 1463. & 1 Bl. Rep. 456. S. C. 11 Vin. Abr. 55. 66.

[w] Salk. 308.

SECT. IV.

Of an executor before probate of the will.

AS a conſequence of the principle that an executor derives all his title from the will, his intereſt is completely veſted at the inſtant of the teſtator's death, and therefore before probate, that is, before the will is authenticated in the ſpiritual court, and a copy of it delivered to him, certified under the ſeal of the ordinary, he may lawfully perform almoſt every act which is incident to the office [a]. Not to mention the funeral, he may make an inventory, and poſſeſs himſelf of the teſtator's effects [b]: he may enter peaceably into the houſe of the heir, and take ſpecialties and other ſecurities for the debts due to the deceaſed [c], or remove his goods [d]: he may pay or take releaſes of debts owing from the eſtate: he may receive or releaſe debts which are owing to it [e]: he may ſell, give away, or otherwiſe diſpoſe, at his diſcretion, of the goods and chattels of the teſtator [f]: he may aſſent to or pay legacies [g]: he may enter on the teſtator's term for years [h]: he may *commence* actions in right of the teſtator, as for treſpaſs committed, or goods taken, or on a contract made in the teſtator's life-time, although he cannot declare before probate, ſince, in order to aſſert ſuch claims in a court of juſtice, he muſt produce the copy of the will, certified under ſeal as above mentioned, or, as it is ſometimes ſtyled, the letters teſtamentary; but when produced, they ſhall

[a] Com. Dig. Admon. B. 9. Plowd. Com. 280. 1 Term Rep. 480. 3 Bac. Abr. 52. Off. Ex. 34. 11 Vin. Abr. 202. 1 Salk. 299.

[b] Off. Ex. 34.

[c] Off. Ex. 34.

[d] Off. Ex. 92. Vid. infr.

[e] Off. Ex 35.

[f] Off. Ex. 35.

[g] Off. Ex. 35. 11 Vin. Abr. 204.

[h] 11 Vin. Abr. 203.

ſhall have relation to the time of ſuing out the writ [i]. So if in the ſame right he file a bill in equity, a ſubſequent probate ſhall be equally available [k]; and according to a late caſe, it ſeems ſufficient if it be obtained at any time before the hearing [l]. So an executor may before probate arreſt a debtor to the eſtate, and ſhall be juſtified in that act by the relation of the ſubſequent grant [m]. But ſuch relation ſhall not prejudice a third perſon, and therefore where the debtor, after being arreſted by the executor before probate, paid a debt to J. S. and continued two months in priſon, he was adjudged not to be a bankrupt from the time of the arreſt, ſo as to invalidate that payment [n].

An executor may alſo *maintain* actions on his own poſſeſſion, as treſpaſs, detinue, or replevin, for goods or cattle of the teſtator taken after the teſtator's death [o]: ſo if he be intitled as executor to the next preſentation to a living, and it become void, he, or his grantee, may maintain a *quare impedit* for it before probate [p].

So he may maintain actions, as treſpaſs or trover, for ſuch of the effects as never came into his actual poſſeſſion, taken or converted after the teſtator's deceaſe [q]. So he may maintain actions on contracts either actually made with him ſubſequent to that event, or ariſing by legal implication, as aſſumpſit for the goods ſold by him [r], or for money due to the teſtator, received by the defendant after the teſtator's death [s]. In all ſuch caſes, the cauſes of

[i] 11 Vin. Abr. 202, et ſeq. Com. Dig. Admon. B. 9. Off. Ex. 36. 3 Bac. Abr. 53.

[k] 3 P. Wms. 351

[l] Patten, executrix, v. Panton 1793, cited 3 Bac. Abr. 53.

[m] Off. Ex. Suppl 103. Roll. Abr. 917.

[n] 11 Vin. Abr. 204. 3 Bac. Abr. 53. Com. Dig. Admon. B. 9. 3 Lev. 57. Skinn. 22. 87. Cooke's Bankrupt Laws, 4 edit. 94.

[o] 11 Vin. Abr. 203. Off. Ex. 36.

[p] 3 Bac. Abr. 53. Off Ex. 36. Com. Dig. Pleader. O. 14. Dyer. 135.

[q] 3 Bac. Abr. 53. Carth. 154.

[r] Off. Ex. 36, 37. in not. 1 Ventr. 109. Bollard v. Spencer, 7 Term Rep. 358 Ca. Temp. Hardwicke, 204. Cockerill v. Kynaſton, 4 Term Rep. 277.

[s] Ld. Raym. 436.

of action arise subsequent to the attaching of the plaintiff's right, and therefore he need not describe himself as executor[t], and consequently no profert of the letters testamentary is requisite. So where a reversion for years is vested in him in that character, he may avow without probate for the rent which accrued after the testator's death, but not for such as accrued before [u].

[t] 2 Term Rep. 477.

[u] 1 Salk. 102. 307. 7 Term Rep. 359.

Such are the acts, which an executor, although the will has not received the sanction of the spiritual court, is warranted in performing, and which his death before probate will not annul [v].

[v] Off. Ex. 35. 11 Vin. Abr. 204. Dyer 367.

On the other hand, if he has elected to administer, he may also before probate be sued at law, or in equity, by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible [w].

[w] Com. Dig. Admon. B. 9. Pl. Com. 280 b. 11 Vin. Abr. 205. 2 Vern. 49. Off. Ex. 37.

If an executor die before probate, he is considered in point of law as intestate in regard to the executorship [x], although he have made a will, and appointed executors; and although he die after taking the oath, if before the passing of the grant.

[x] Off. Ex. Suppl. 74, 75. 182. 11 Vin. Abr. 68. 90.

If A. be executor for a certain period, and B. be nominated executor for the time subsequent, and A. prove the will; after the time is expired B. may sue without another probate [y].

[y] Com. Dig. Admon. B. 9. Ca. Ch. 265. 11 Vin. Abr. 56.

SECT.

SECT. V.

Of the probate.—Juriſdiction of granting the ſame —of bona notabilia.

I PROCEED now to conſider the probate of a will. The juriſdiction of proving wills conſequent, as will be hereafter ſhewn, on the power of granting adminiſtrations, regularly belongs to the biſhop of the dioceſe, or the metropolitan of the province, in which the parties reſided at the time of their death [a]. But if a teſtator die within ſome peculiar juriſdiction, which is either regal, archiepiſcopal, epiſcopal, or archidiaconal: in each of theſe the owner hath of common right the power of granting probate. This privilege is founded on the notion of an original compoſition between ſuch owner and the ordinary of the dioceſe for that purpoſe [b].

[a] 3 Bac. Abr. 34. 39. Com. Dig. Admon. B. 6. 4 Burn. Eccl. L. 188.

[b] 3 Bac. Abr. 39. Salk. 40. 41. 11 Vin. Abr. 77.

Courts baron which have had the probate of wills from time immemorial, and have always continued that uſage, are alſo intitled to this ſpecies of juriſdiction. But they can claim it only by preſcription [c].

[c] 3 Bac. Abr. 39. Off. Ex. 44. Salk. 41. Cowp. 286.

By cuſtom alſo the probate of wills of burgeſſes belongs to the mayors of ſome boroughs in reſpect of lands deviſable within the ſame, yet as to perſonal property, the will muſt be proved before the ordinary [d].

[d] 3 Bac. Abr. 40. Off. Ex. 45. Off. Ex. Suppl. 10.

But in general, a probate can be granted only in the court of the ordinary, or of the metropolitan.

If all the effects at the time of the teſtator's death lie within one dioceſe, the executor ought regularly to appear before the biſhop or his ſurrogate, and prove the will.

But if the teſtator hath left *bona notabilia*, or effects to the value eſtabliſhed by 92 canon *Jac.* 1. namely, a hundred ſhillings in two diſtinct dioceſes, or in ſeveral peculiars within the ſame province; then the will muſt be proved before the metropolitan, by way of ſpecial prerogative [c]; whence the court where the validity of ſuch wills is tried, and the office where they are regiſtered, are called the prerogative court and the prerogative office, of the provinces of Canterbury and York [f]. So if there are *bona notabilia* in thoſe ſeveral provinces, the archbiſhops ſhall in each of them grant probate according to the *bona notabilia* in their reſpective provinces. Each of them has ſupreme juriſdiction, and neither can act within the province of the other [g]. If there are *bona notabilia* in different dioceſes of one province, and in one dioceſe only of the other, in reſpect to the former, the archbiſhop ſhall have the probate, in reſpect to the latter the particular biſhop [h].

[c] 2 Bl. Com. 509. 3 Bac. Abr. 36. Com. Dig. Admor. B. 3. Off. Ex. 45. 48. 4 Burn. Eccl. L. 191. Roll. Abr. 909. 11 Vin. Abr. 79.

[f] 2 Bl. Com. 509. 11 Vin. Abr. 56. pl. 7.

[g] 3 Bac. Abr. 36. 1 Salk. 39. 2 Lev. 86. 11 Vin. Abr. 76. pl. 15.

[h] Off. Ex. 48.

So

So if the teſtator, not in *itinere*, die in one dioceſe, not having any goods there, but having *bona notabilia* in another dioceſe, the archbiſhop ſhall grant the probate [i].

[i] 3 Bac. Abr. 36. Roll. Abr. 909. 4 Burn. Eccl. L. 189. 11 Vin. Abr. 80.

So if the goods be in ſeveral peculiars of a biſhop's dioceſe, in that caſe probate ſhall not be granted by him, but by the metropolitan, inaſmuch as peculiars are exempt from ordinary juriſdiction [k]. But where the teſtator dies poſſeſſed of goods in the dioceſe of an archbiſhop, and in a peculiar of the ſame dioceſe, there muſt be ſeveral probates: the archbiſhop ſhall have no prerogative, becauſe the peculiar was derived out of his epiſcopal juriſdiction [l]. By the canon 92 *Jac.* 1. above referred to, goods which a man has with him, who dies in *itinere*, ſhall not make *bona notabilia* [m]; but if a man have two houſes in different dioceſes, and reſides chiefly at one, but ſometimes goes to the other, and being there for a day or two, dies, leaving no *bona notabilia* in the firſt mentioned houſe, probate ſhall be granted by the biſhop of the dioceſe in which the teſtator died, for he was commorant there, and not there as a traveller [n].

[k] 4 Burn. Eccl. L. 191. 11 Vin. Abr. 80.

[l] 4 Burn. Eccl. L. 191. Cro. El. 719. Vid. 1 Bl. Com. 380.

[m] Vid. Off. Ex. Suppl. 27.

[n] 4 Burn. Eccl. L. 191. 1 Salk. 37.

If there are *bona notabilia* in England and Ireland, ſeveral probates ſhall be granted by the archbiſhop or biſhop in England, and the archbiſhop or biſhop in Ireland, as the caſe may require [o]. The probate of a biſhop's will, although he had goods only in his own juriſdiction, belongs to the archbiſhop

[o] 3 Bac. Abr. 36. Dyer 305. Roll. Abr. 908.

of the province [p]. If the teſtator died beyond ſea, although the goods be in one dioceſe only, the archbiſhop is to grant the probate [q]. If the probate be granted by a biſhop or inferior judge, when it does not belong to him, it is void; but if it be granted by the metropolitan when it does not belong to him, it is only voidable, and is of force till reverſed by ſentence, for he hath juriſdiction over all the dioceſes within his province [r].

[p] 3 Bac. Abr. 37. 4 Inſt. 335.

[q] 3 Bac. Abr. 36. Roll. Abr. 908.

[r] 3 Bac. Abr. 36. 4 Burn. Eccl. L. 193. Off. Ex. Suppl. 27. 11 Vin. Abr. 75. 80.

In the above mentioned canon, *Jac.* 1. there is a proviſion, that the juriſdiction of thoſe dioceſes ſhall not be prejudiced where, by compoſition, or cuſtom, *bona notabilia* are rated at a greater ſum, as in London, where by compoſition they are to amount to ten pounds [s].

[s] 3 Bac. Abr. 37.

Nor is it neceſſary that the deceaſed ſhould have left effects to the value of five pounds, in each of the ſeveral dioceſes where they are diſperſed; if there be effects in any one dioceſe other than that in which he died to the amount of five pounds, they conſtitute *bona notabilia* [t]. But if the goods in the dioceſe where he died are of the value of ten pounds, or upwards, and he hath not left goods amounting to five pounds, in another dioceſe, they ſhall not be denominated *bona notabilia* [u]. But if goods are left in two dioceſes to the amount of five pounds, in the whole, they ſhall be *bona notabilia*, and conſequently ſubject to the archbiſhop's juriſdiction [v], for in that caſe neither of the biſhops has an excluſive authority. *Bona notabilia* may conſiſt of goods to the value of five pounds, in one

[t] 3 Bac. Abr. 37. Godolph. 65.

[u] 3 Bac. Abr. 37. Godolph. 69.

[v] 4 Burn. Eccl. L. 189. Roll. Abr. 908, 909.

one dioceſe, and a leaſe or term for years of that value in another, in which the lands lie [w].

[w] 3 Bac. Abr. 37. Com. Dig. Admor. B. 4.

Or of debts due to the deceaſed, however difficult to be collected, or however deſperate [x].

[x] 3 Bac. Abr. 47. Com. Dig. Admor. B. 4.

So it ſeems of a debt due from the king, for which there is no remedy but by petition [y].

[y] Off. Ex. 46. 11 Vin. Abr. 80.

But if there be a bond in the penalty of five pounds, to ſecure the payment of a leſs ſum, and the ſame be forfeited, it ſhall not be claſſed among *bona notabilia* [z]. And it was ſo held even antecedent to the ſtatute 4 & 5 *Ann. c.* 16. *ſ.* 13. whereby the penalty is ſaved on bringing principal, intereſt, and coſts into court.

[z] Off. Ex. 46.

Nor ſhall lands deviſed to executors for payment of debts and legacies, although they become aſſets, be conſidered as ſuch goods [a]. On this point the law makes a diſtinction between debts by ſpecialty and debts by ſimple contract. It regards debts by ſpecialty, as the deceaſed's goods in that dioceſe where the ſecurities are found at the time of his death, although they were entered into in another; or the debtor or creditor at the time when they were executed lived in a different dioceſe [b]. But debts by ſimple contract follow the perſon of the debtor, and therefore are eſteemed the deceaſed's effects in that dioceſe where the debtor reſided at the creditor's death [c]. On this principle it hath been holden, that a judgment obtained in one of the

[a] 3 Bac. Abr. 37. Off. Ex. 47. 11 Vin. Abr. 80.

[b] 3 Bac. Abr. 37. Off. Ex. 46. Roll. Abr. 909.

[c] 3 Bac. Abr. 38. Off. Ex. 47.

the courts at Weſtminſter, although in an action laid in Dorſetſhire, made *bona notabilia*, becauſe the record was at Weſtminſter; but that a debt on a bill of exchange followed the perſon of the debtor [d].

[d] 1 Salk. 40. pl. 9. 3 Salk. 164. Ld. Raym. 854. 11 Vin. Abr. 77. 80.

An annuity out of a parſonage ſhall be reputed to be property in the dioceſe where the parſonage lies [e]. And leaſes for years where the land lies, not where the leaſe is merely found [f].

[e] Com. Dig. Admor. B. 4. Dyer 305, in not. 11 Vin. Abr. 80.

[f] Com. Dig. Admor. B. 4.

Debts on recognizances, ſtatutes, or judgments, ſhall be *bona notabilia* where they were acknowledged or given [g].

[g] Com. Dig. Admor. B. 4. Dyer 305, in not.

And by ſtatute 4 & 5 *Ann. c.* 16. *ſ.* 26. ſalary, wages, or pay, due to perſons for work in any of her majeſty's yards or docks, ſhall not be taken or deemed to be *bona notabilia*, whereby to found the juriſdiction of the prerogative courts.

If the will be not conteſted, the executor may prove it in the common form by his own oath, and in ſome of the dioceſes of York, with the additional oath of one witneſs, or in caſe its validity is called in queſtion, he will be required to ſubſtantiate it more ſolemnly *per teſtes*, by the examination of witneſſes in the preſence of the parties intereſted, as the widow and next of kin [h]. This latter mode of proving a will is ſeldom reſorted to, unleſs at the inſtance of a party whoſe object is to oppoſe it [i]; but the executor himſelf may, for greater ſafety,

[h] 3 Bac. Abr. 39. 2 Bl. Com. 508. 4 Burn. Eccl. L. 205, 206, 207.

[i] 4 Burn. Eccl. L. 207.

ſafety, if he has an intereſt in the will, elect to have it ſanctioned by this more deciſive ſpecies of evidence, and call on the next of kin to ſee it propounded [i].

[i] 4 Burn Eccl. L. 208.

When a will is to be thus ſolemnly proved, two witneſſes are indiſpenſable; for, generally, by the civil law, the teſtimony of two perſons is requiſite, and therefore if in the probate of a will that of one witneſs is diſallowed in the eccleſiaſtical court, no mandamus will lie, for inaſmuch as that court has juriſdiction of the ſubject matter, it has ſo alſo of the mode of proof, and the proceedings reſpecting it [k].

[k] 4 Burn Eccl. L. 206. Roll. Abr. 300.

It is not neceſſary that ſuch witneſſes ſhould have read the will, or heard it read, if they can depoſe that the teſtator declared that the writing produced was his laſt will and teſtament [l], or duly executed the ſame, in their preſence.

[l] 4 Burn Eccl. L. 205. Godolph. 66.

If the will or codicil be written in the teſtator's hand-writing, although it have neither his name ſubſcribed, nor his ſeal affixed to it, nor had witneſſes preſent at its publication, yet it is of ſufficient validity on proof of the hand-writing [m], by the evidence of two perſons acquainted with the character of it from having ſeen him write; but in caſe there be a ſingle ſubſcribing witneſs to the will, and who appears to atteſt it, the teſtimony of one perſon only to the above mentioned effect is requiſite.

[m] 2 Bl. Com. 501.

So, although written by another hand, nor even ſigned by the teſtator, if it can be ſhewn to be according to his inſtructions, and read over, and approved by him, it is equally effectual [n].

[n] 2 Bl. Com. 501. Vid. Com. Rep. 451.

An executor on taking probate ſwears, that the writing contains the true laſt will and teſtament of the deceaſed, as far as the deponent knows, or believes, and that he will truly perform the ſame by paying firſt the teſtator's debts, and then the legacies therein contained, as far as the goods, chattels, and credits will thereto extend, and the law charge him; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the ſame into the regiſtry of the ſpiritual court at the time aſſigned him by the court, and render a juſt account thereof when lawfully required.

When the will is proved, the original is depoſited in the regiſtry of the ordinary or metropolitan, and a copy thereof, in parchment, is made out under his ſeal, and delivered to the executor, together with a certificate of its having been proved before him; and ſuch copy and certificate are uſually ſtyled the probate [o].

[o] 2 Bl. Com. 508. 4 Burn Eccl. L. 215. 11 Vin. Abr. 56. pl. 7. Bac. Uſe of the Law, 67.

SECT.

SECT. VI.

Of the probate of nuncupative wills.

A NUNCUPATIVE will is alſo capable of being proved [a]. But by the ſtatute of frauds, after ſix months from the ſpeaking of the pretended teſtamentary words, no teſtimony ſhall be received to prove any will nuncupative, except the teſtimony, or the ſubſtance thereof, were committed to writing within ſix days after the making of ſuch will. And no letters teſtamentary, or probate of any nuncupative will, ſhall paſs the ſeal of any court till fourteen days at the leaſt after the deceaſe of the teſtator be fully expired. Nor ſhall any nuncupative will be at any time received to be proved, unleſs proceſs have firſt iſſued to call in the widow, or next of kindred to the deceaſed, to the end they may conteſt the ſame if they pleaſe. And (as we may remember), no will in writing, concerning any goods, or chattels, or perſonal eſtate, ſhall be repealed, nor ſhall any clauſe, deviſe, or bequeſt therein be altered or changed by any words, or will by word of mouth only; except the ſame be in the life of the teſtator committed to writing, and after the writing thereof, read to the teſtator, and allowed by him, and proved to be ſo done by three witneſſes at the leaſt.

[a] 2 Bl. Com. 500.

SECT. VII.

Of the probate of the wills of ſeamen, and marines.

IN regard to the making and probate of the wills of petty officers and ſeamen in the king's ſervice, and of non-commiſſioned officers of marines, and marines, ſerving on board a ſhip in the king's ſervice, by the ſtatutes 26 *Geo.* 3. *c.* 63. and 32 *Geo.* 3. *c.* 34. above referred to[a], no will made by any perſon of ſuch deſcription, whereby any wages, pay, prize-money, or allowance of money of any kind due for ſuch ſervice is bequeathed, ſhall be valid, unleſs, if made while the party is in the ſervice, it be ſigned before, and atteſted by the captain or the officer then commanding, and one of the ſigning officers of the ſhip to which the party belongs; and unleſs it ſpecify in the body thereof the name of the ſhip, and the number at which the maker of the will ſtands upon the ſhip's book, and contains a full deſcription of the reſidence, profeſſion, or buſineſs of the perſon in whoſe favour it is made, and the day of the month, and the place where it was executed, or by the agent of any of his majeſty's hoſpitals or quarters appointed to receive ſick and wounded ſeamen, in which the party may be at the time; or, if made by ſuch officer or ſeaman diſcharged from the ſervice, within the bills of mortality, unleſs it be atteſted by the officer appointed by the treaſurer of the navy to inſpect ſuch wills; or,

[a] Vid. ſupr. 3, 4.

or, if made at any of the ports where ſeamen's wages are paid, unleſs it be atteſted by the treaſurer of the navy's chief or ſecond clerk there; or, if made at any other place, unleſs it be atteſted by the miniſter and churchwardens of the pariſh in England or Ireland, or by the miniſter and two elders of the pariſh in Scotland, where ſuch petty officer, or ſeaman, and executors ſhall reſpectively reſide.

And after the will ſhall be ſo executed and atteſted, it ſhall not be delivered to the party himſelf, but, if executed abroad, ſhall be ſent by the commander of any of his majeſty's ſhips, or agent of any of his majeſty's hoſpitals or ſick quarters, when they tranſmit their reſpective returns to the navy and ſick and hurt boards, or if executed in Great Britain or Ireland, ſhall be ſent by the commander of any of his majeſty's ſhips, or agents of his majeſty's hoſpitals or ſick quarters, treaſurer of the navy's clerks, miniſter of the pariſh, or whoever of them ſhall atteſt ſuch will, by the general poſt, addreſſed to the treaſurer or paymaſter of the navy, at the navy pay-office, London. And the treaſurer or paymaſter ſhall immediately deliver over ſuch will to the inſpector, who ſhall immediately on the receipt thereof duly regiſter the ſame.

And in caſe he ſhall ſee reaſon to ſuſpect the authenticity of ſuch will, he ſhall report the ſame to the treaſurer or paymaſter of the navy, and ſhall enter his caveat againſt ſuch will, which ſhall pre-

vent any money's being received thereon till the ſame ſhall be authenticated to the ſatisfaction of the treaſurer or paymaſter; but if ſuch inſpector ſhall ſee no cauſe to ſuſpect the will, he ſhall affix the ſtamp of his office, and ſhall iſſue a check in lieu of ſuch will, ſhewing the receipt of the ſame at his office, and mentioning its particular heads, with directions to return the check on the teſtator's death; to which check ſhall be ſubjoined a blank certificate, to be ſigned by two reputable houſekeepers of the pariſh where the executor is reſident at the time ſuch certificate ſhall be returned, of the identity of the executor, and of his being an inhabitant of the pariſh; and alſo another blank certificate, to be ſigned by the miniſter of the pariſh, and two of the churchwardens, or two elders of the ſame, as the caſe may be, certifying that ſuch two houſekeepers are reſident within the pariſh, and of good repute. And the check muſt alſo expreſs, that if the teſtator dies after he leaves the naval ſervice, a certificate of his burial, or ſome other authentic proof of his death, muſt alſo be ſent to the office, and alſo muſt deſire the executor to nominate a proctor to be employed in obtaining a probate, and direct the above certificates to be filled up on the teſtator's death, and the check to be ſent by the general poſt under cover, directed to the treaſurer or paymaſter of his majeſty's navy, London. And ſuch check, with the certificates duly filled up, having been returned to the pay office in the event of the teſtator's death, the inſpector ſhall note on the will the amount of the wages due

due to the deceaſed, and ſhall forward the will to ſuch proctor, together with a letter addreſſed to the miniſter and churchwardens, or elders (as the caſe may be), of the pariſh within which the executor ſhall then reſide, franked by the treaſurer or paymaſter, or inſpector, and ſuch letter to incloſe a commiſſion or requiſition and copy of the will, informing ſuch miniſter of the receipt of the check, and the certificates annexed, atteſted by him, and the two churchwardens or elders, and requiring him to execute the commiſſion or requiſition, by ſwearing the executor, and when executed, to return it, with a copy of the will, to the pay-office, and to ſpecify and deſcribe the receiver-general of the land tax, the collector of the cuſtoms, or of the exciſe, or the clerk of the check, whoſe abode is neareſt to the executor, when ſuch perſon will be directed to pay him the wages due to the deceaſed; and the proctor having received the will, and the letter ſo written by the inſpector, ſhall immediately ſue out the previous commiſſion or requiſition, and ſhall incloſe it, together with inſtructions for executing the ſame, and a copy of the will in ſuch letter, and ſhall tranſmit the letter by the general poſt, to the miniſter, churchwardens, or elders; and they immediately on the receipt thereof, ſhall proceed to the execution of ſuch commiſſion or requiſition, and, the ſame being ſo executed, ſhall tranſmit it to the treaſurer or paymaſter. And if the executor ſhall reſide at a diſtance from the place where the wages, prize-money, or other allowance due to the deceaſed, are

payable, they ſhall ſpecify and deſcribe one of the perſons enumerated in the letter, who may reſide neareſt to the executor. And the treaſurer or paymaſter ſhall, immediately on the receipt thereof, ſend the previous commiſſion or requiſition ſo executed, to the proctor, who in purſuance thereof ſhall forthwith ſue out and procure ſuch probate.

And if any proctor or officer of the eccleſiaſtical court, ſhall take more for his charges than the ſums by the act directed to be taken in the different events therein ſpecified, he ſhall forfeit fifty pounds; or if he ſhall be aiding or aſſiſting in procuring probate of a will, or letters of adminiſtration, for the purpoſe of enabling any perſon to receive ſuch wages, prize-money, or allowance of money, otherwiſe than in the manner preſcribed by theſe acts, ſuch proctor or other officer ſhall forfeit five hundred pounds, and for ever after be incapable of acting in any capacity in any eccleſiaſtical court in Great Britain.

The proviſions of theſe two acts are extended by ſtatute 32 *Geo.* 3. *c.* 67. to petty officers and ſeamen, non-commiſſioned officers of marines, and marines, ſerving or who may have ſerved on board any of his majeſty's ſhips, and who are reſident in Ireland.

SECT.

SECT. VIII.

Of the probate under ſpecial circumſtances.

IF the executor be infirm, or live at a diſtance, it is uſual to grant a commiſſion or requiſition to the archbiſhop or biſhop, in England or Ireland (as the caſe may be), or if in Scotland, the Weſt Indies, or other foreign parts, to the magiſtrates or other competent authority, to adminiſter the oath to be taken previous to granting probate of the will [a]. Otherwiſe if the executor do not within a reaſonable time appear voluntarily, he may, as I have already mentioned, purſuant to the ſtatute 21 *H.* 8. *c.* 5. be cited by the ordinary *ex officio, to prove or refuſe the teſtament.* In caſe of non-appearance on the proceſs he may be excommunicated, and the goods of the deceaſed ſequeſtered until the probate [b], or adminiſtration with the will annexed, may be granted, in pain of his contumacy, provided an intimation to that effect be contained in the proceſs.

[a] Vid. 4 Burn Eccl. L. 208.

[b] Vid. 4 Burn Eccl. L. 204.

But the practice of iſſuing ſuch citations is now become obſolete, unleſs at the ſuit of the parties intereſted: if, however, the executor acts and neglects to take probate within ſix months after the death of the teſtator, by the above-mentioned ſtatute of 37 *G.* 3. *c.* 90. he incurs the penalty of fifty pounds.

On

On the other hand, the ordinary is bound to grant probate of the will, and, if the executor accept the office, and claim the probate, in case of the ordinary's refusal to grant it, a writ of *mandamus* may issue from the court of King's Bench to compel him [c]: for although the spiritual court is to determine whether there be a will or not, yet if there be a will, the executor has a temporal right, nor shall any terms be imposed on him except such as the will prescribes [d]. But if the will be litigated, the bishop may in his return to the writ state, that a suit is depending before him in regard to the fame, and not yet determined. And such return will be sufficient [e].

[c] 4 Burn Eccl. L. 204.

[d] Ld. Raym. 361. Stra. 672.

[e] Ld. Raym. 262. Burr. 2295. 4 Burn. Eccl. L. 205.

This jurisdiction the metropolitan or ordinary may exercise either himself or by his official; for it is merely a ministerial act, and concerns him not in his spiritual capacity [f].

[f] 3 Bac. Abr. 39. Cowp. 140.

The power of granting probates is not local, but is annexed to the person of the archbishop or bishop; and therefore a bishop or the commissary of a bishop, while absent from his diocese, may grant probate of wills respecting property within the fame; or if an archbishop or bishop of a province or see in Ireland happens to be in England, he may grant probate of wills relative to effects within his province or diocese [g].

[g] 3 Bac. Abr. 39. 11 Vin. Abr. 78. Cro. Car. 214.

If

If the ſee be vacant, or in caſe of the ſuſpenſion of the biſhop or archbiſhop, the dean and chapter are to grant the probate [h].

[h] 3 Bac. Abr. 39. Roll. Abr. 908. 11 Vin. Abr. 74, 75. 77. Lutw. 30.

The proving of a biſhop's will, although he left goods only within his own juriſdiction, belongs to the archbiſhop [i].

[i] 11 Vin. Abr. 74. 4 Inſt. 335.

If there be ſeveral executors, and one takes probate, he takes it with a reſervation to the reſt. If another applies for that purpoſe, an engroſſment of the original will is to be annexed to the ſecond probate in the ſame manner as to the firſt, and in the ſecond grant the firſt grant is to be recited. And ſo of the reſt. And this is ſtyled a double probate [k].

[k] 4 Burn Eccl. L. 201.

Where ſeveral executors are appointed, as formerly mentioned [l], with ſeparate and diſtinct powers, yet as there is but one will, one probate ſhall be ſufficient [m].

[l] Vid. ſupr. 16.

[m] 3 Bac. Abr. 30. Off. Ex. 13.

Where probate of the will of a married woman is granted to her executor, if he be not her huſband, it is limited to the property over which ſhe had a diſpoſing power, unleſs the huſband, either in perſon or by proxy, conſent to a general probate's being granted to her executor.

If a will be limited to any ſpecific effects of a teſtator, the probate ſhall be alſo limited, and an adminiſtration *cæterorum* granted.

The

The intereſt veſted by the will of the deceaſed in the executor, may, if he take out probate, be continued, and kept alive by the will of the ſame executor, ſo that the executor of A.'s executor is to all intents and purpoſes the executor and repreſentative of A. himſelf [l], and may be directly ſo named in legal proceedings [m]. For the power of an executor is founded on the ſpecial confidence and actual appointment of the deceaſed. Such executor, therefore, may tranſmit that power to another in whom he has equal confidence. And, ſo long as the chain of repreſentation is unbroken by any inteſtacy, the ultimate executor is the repreſentative of every preceding teſtator, in however numerous a ſucceſſion. Nor is a new probate of the original will in any of the ſubſequent ſtages requiſite [n].

[l] 2 Bl. Com. 506. Com. Dig. Admor. B. 6. 11 Vin. Abr. 68. 90. 107. Off. Ex. Suppl. 140. Plow. 525.

[m] Com. Dig. Admon. G. 1 Leon. 275.

[n] 1 Salk. 309.

If there be ſeveral co-executors, and they all prove, the intereſt goes only to the executor of the laſt ſurvivor, and although ſuch ſurvivor refuſed to prove in the life-time of the other executors, he may take out probate after their death, and in that caſe the intereſt will be equally tranſmitted to his executor. But if ſuch ſurviving executor renounces after their death, adminiſtration ſhall be granted, and then his executor will have no title to the original executorſhip [o].

[o] 11 Vin. Abr. 68, 69. 114. 1 Salk. 307. 311. Hard. 111. Com. Dig. Admor. B. 1.

If A. appoint B. and C. his executors, and die, and B. make J. S. his executor, and die, and afterwards C. dies inteſtate; the executor of B. ſhall

not be the executor of A. becauſe the executorſhip veſted ſolely in C. as ſurvivor, and as he died inteſtate, adminiſtration muſt be taken out to A. [p]

[p] 11 Vin. Abr. 88.

Wills which concern the perſonal eſtate only, are ſubject to the juriſdiction of the eccleſiaſtical courts [q].

[q] 4 Burn Eccl. L. 195.

Where the will reſpects lands merely, the ſpiritual court ought not to grant probate, and if there be a ſuit to compel it, a prohibition will lie [r].

[r] 4 Burn Eccl. L. 195. Cro. Car. 396. 2 Vez. junr. 230.

But when the will is of a mixed nature, that is, relates both to real and perſonal property, the probate of it ſhall be entire in the ſpiritual court [s].

[s] Cro. Car. 396. 11 Vin. Abr. 57. 60. 117. 2 Salk. 552. 3 Salk. 22.

A will may be proved with a reſervation as to a particular legacy. And in ſuch caſe, if there be a decree againſt ſuch legacy as a forgery, or interpolation, in the eccleſiaſtical court, the will ſhall be engroſſed without it, and ſo annexed to the probate [t].

[t] 4 Burn Eccl. L. 209. 1 P. Wms. 388.

The will of a party who has been long abſent from this country, may be proved, if he is generally underſtood to be dead, and the executor will take upon himſelf to ſwear that he believes him to be ſo [u].

[u] Off. Ex. Suppl. 63. Swinb. part 6. ſ. 13.

If

If the executor named in the will be unknown, or concealed, adminiſtration may, after due proceſs, be granted till he appear and claim the probate [w].

[w] 4 Burn Eccl. L. 202. Roll. Abr. 907.

If the will be loſt, two witneſſes, ſuperior to all exception, who read the will, prove its exiſtence after the teſtator's death, remember its contents, and depoſe to its tenour, are ſufficient to eſtabliſh it [x].

[x] 4 Burn Eccl. L. 209.

So where the teſtator had delivered his will to A. to keep for him, and four years afterwards died, when the will was found gnawn to pieces by rats, and in part illegible, on proof of the ſubſtance of the will by the joining of the pieces, and the memory of witneſſes, the probate was granted [y].

[y] Off. Ex. Suppl. 215.

If the teſtator reſided in Scotland, and left effects there and in England, the will is proved in the firſt inſtance in the court of Great Seſſions in Scotland, and a copy duly authenticated being tranſmitted hither, it is proved in the prerogative court, and depoſited as if it were an original will.

So in ſuch caſe, if the teſtator reſided in Ireland, the will is proved in the ſpiritual court of that country; or if in the Eaſt or Weſt Indies, in the probate court there, and a copy tranſmitted, proved, and depoſited in the ſame manner.

Where

Where the teſtator was reſident in England, not merely as a viſitor, and has left property in the plantations, the judge of probate in the plantations is bound by a grant of probate by the prerogative court here, and ought to make a ſimilar grant to ſuch grantee [z].

[z] Amb. 415.

If a will be made in a foreign country, diſpoſing of goods in England, it muſt be proved here [a]. But if the effects were all abroad, and the will be proved according to the cuſtom of the country where the teſtator died, it is ſufficient. And the executor may plead ſuch matter to a bill filed againſt him by the adminiſtrator, for an account of the deceaſed's perſonal eſtate [b].

[a] 11 Vin. Abr. 58.

[b] 11 Vin. Abr. 59. 69. 1 Vern. 397.

If a will be in a foreign language, the probate is granted of a tranſlation of the ſame by a notary public.

SECT. IX.

Of caveats, revocation of probates, and appeals.

WHEN the will is oppoſed, it is the practice to enter a caveat in the ſpiritual court to prevent the probate. And it is ſaid, that by the rules of that court, the caveat ſhall ſtand in force for three months, and that while it is pending, probate cannot be granted; but whether the law recognizes a caveat,

caveat, and allows it ſo to operate, or whether it does not regard it as a mere cautionary act by a ſtranger, to prevent the ordinary from committing a wrong, is a point on which the judges of the temporal courts have differed [a].

[a] 3 Bac. Abr. 41. 1 Lev. 186.

Probate of a will is ſuſpended by appeal, but it cannot be ſtayed at the ſuit of a creditor, till a commiſſion of appraiſement iſſued be returned [b]; for by the ſtatute 21 *H.* 8. *c.* 5. the probate is to be granted with convenient ſpeed, without any fruſtratory delay.

[b] 11 Vin. Abr. 63. 4 Burn Eccl. L. 230. Stra. 857.

If a probate has been granted by the wrong juriſdiction, it is cauſe of reverſal, or nullity, according to the diſtinction before ſtated [c].

[c] Off. Ex. 48. Vid. ſupr. 30.

So alſo if the will be fraudulently proved, either in the common form, that is to ſay, by the oath of the executor, or more ſolemnly by the examination of witneſſes, on ſuch fraud being ſhewn, the ſpiritual court will revoke the probate. So alſo it may be vacated on proof of a revocation of the will on which it was granted, or of the making of one ſubſequent [d].

[d] Off. Ex. 48.

An appeal [e] in regard to probates, by ſtatute 24 *H.* 8. *c.* 12. lies from the court of the archdeacon, or his official (if the matter be there commenced), to the biſhop of the dioceſe; and by virtue of the ſame ſtatute, from the biſhop dioceſan, or his commiſſary, to the archbiſhop of the province,

[e] Com. Dig. Prerogative.

vince, within fifteen days next after ſentence. When the cauſe is commenced before the archdeacon of the archbiſhop, or his commiſſary, by the ſame ſtatute there may be an appeal within the ſame period to the court of arches, or audience of the archbiſhop. And from the court of arches or audience, within fifteen days next after ſentence given to the archbiſhop himſelf; and in caſe the king himſelf be a party in ſuch ſuits, the appeal ſhall be within fifteen days next after ſentence given, to all the biſhops of the realm in the upper houſe of convocation aſſembled. By that ſtatute, and alſo by ſtatute 25 *H.* 8. *c.* 19. appeals to the pope are prohibited, and by the latter ſtatute are given from the archbiſhop's courts to the king in chancery, where a commiſſion ſhall be awarded under the great ſeal, to certain perſons to be named by the king for the determination of the appeals; and thoſe commiſſioners are called delegates, inaſmuch as they are delegated by the king's commiſſion. And farther, although this laſt cited ſtatute declare the ſentence of the delegates definitive, the king, on complaint to him made, may grant a commiſſion of review to reviſe the ſentence of the delegates [h]; becauſe the pope, as ſupreme head by the canon law, uſed to grant ſuch commiſſion; and ſuch authority as the pope heretofore exerciſed, is now annexed to the crown by ſtatute 26 *H.* 8. *c.* 1. and 1 *Eliz.* *c.* 1. But it is not matter of right, which the ſubject may demand *ex debito juſtitiæ*, but merely a matter of favour, which is never granted but under ſpecial circumſtances [i].

[h] Off. Ex. Suppl. 127. 129. 3 Bl. Com. 64—67.

[i] 3 Bl. Com. 67.

Before revocation of a probate the court will not grant a new one [k].

[k] 4 Burn Eccl. L. 193. 7 Mod. 146.

Where probate granted by the ſpiritual court is affirmed on an appeal to the arches, or delegates, the uſage is to ſend the cauſe back. But when the firſt ſentence is reverſed, the court below ſhall be ouſted of its juriſdiction, and the court which reverſes it ſhall grant probate *de novo* [l].

[l] 11 Vin. Abr. 76. Com. Dig. Admor. B. 2. 2 Roll. Abr. 233.

SECT. X.

The effect of a probate.—Loſs of the ſame.—What is evidence of probate.—Effect of its revocation.

THE probate thus paſſed, although it does not confer, yet authenticates the right of the executor, and ſhall have relation to the time of the teſtator's death [a].

[a] 11 Vin. Abr. 205. Off. Ex. 49. 1 Term Rep. 480. 4 Term Rep. 260.

If the will be proved in common form, it may at any time within thirty years be diſputed; if in the more formal mode, and all perſons intereſted are made parties to the ſuit, and there be no proceedings within the time limited for appeals, it is liable to no future controverſy [b].

[b] 4 Burn Eccl. L. 207. Godolph. 62.

So long as the probate remains unrevoked, the ſeal of the ordinary cannot be contradicted, for the temporal

temporal court cannot pass a judgment respecting a will in opposition to that of the ecclesiastical court, and therefore if a probate under seal be shewn, evidence will not be admitted that the will was forged, or that the testator was *non compos mentis*, or that another person was executor; for these are points which are exclusively of spiritual cognizance: but it may be shewn that the seal was forged, or that there were *bona notabilia*, for such evidence is no contradiction to the seal, but admits and avoids it [c].

[c] Stra. 671, 672. 4 Burn Eccl. L. 196.

Such then being the nature of a probate, inasmuch as it is a judicial act of a court having competent authority; and is conclusive till it be repealed, and a court of common law cannot admit evidence to impeach it; it was determined in a recent case, in opposition to some old decisions [d], that payment of money to an executor, who had obtained probate of a forged will, was a discharge to the debtor of the intestate, although the probate were afterwards revoked, and administration granted to the next of kin [e].

[d] 1 Roll. Abr. 919. Com. Rep. 152. Vid. 11 Vin. Abr. 89.

[e] Allen v. Dundas, 3 Term Rep. 125.

And on the same principle it is holden, that pending a suit in the spiritual court respecting the validity of a will, an indictment for forging it ought not to be tried; and it is the practice to postpone the trial, till that court has given sentence [f].

[f] 3 Bac. Abr. 34. 1 Stra. 481. 703.

But a payment of money under probate of a ſuppoſed will of a living perſon would be void, becauſe in ſuch caſe the eccleſiaſtical court has no juriſdiction; and the probate can have no effect. The power of the ordinary extends only to the proving of wills of perſons deceaſed [g].

[g] 3 Term Rep. 130.

Where the probate is loſt, the ſpiritual court never grants a ſecond, but merely an exemplification of the probate from its own records, and ſuch exemplification is evidence of the will's having been proved [h].

[h] Stra. 412. 4 Burn Eccl. L. 219.

The copy of the probate of a will of perſonal property is evidence, inaſmuch as the probate is an original taken by authority, and of a public nature [i].

[i] 3 Salk. 154. Ld. Raym. 154. Law of Ni. pri. 245, 246. 4 Burn Eccl. L. 219.

The regiſter's book, or as it is ſometimes ſtyled the ledger-book, in the ſpiritual court, is evidence that there was ſuch will, in caſe of its being loſt [k].

[k] 4 Burn Eccl. L. 218. Ld. Raym. 731.

A copy of the ledger-book ſeems alſo to be ſufficient proof for the ſame purpoſe; ſince ſuch book is a roll of the court, and, therefore, a copy of it is not a copy of a copy, as hath been erroneouſly ſuppoſed [l].

[l] L. of Ni. Pri. 246.

If iſſue be taken on a probate of a will, it ſhall be tried by a jury [m].

[m] Off. Ex. Suppl. 9. 9 Co. Rep. 31.

The probate, or as it is ſometimes called, the letters teſtamentary, may be revoked either on a ſuit

ſuit by citation, or on appeal to reverſe a ſentence by which they are granted; and in caſe of revocation, all the intermediate acts of the executor ſhall be void.

But where a widow poſſeſſed herſelf of the perſonal eſtate as executrix under a revoked will, and paid debts and legacies without notice of the revocation, ſhe was allowed thoſe payments in equity; but leaſes which ſhe had granted were ordered to be ſet aſide [n].

[n] 3 Bac. Abr. 50. 1. Chan. Ca. 126.

CHAP. III.

OF THE APPOINTMENT OF ADMINISTRATORS.

SECT. I.

Of general adminiſtrations—origin thereof—who entitled.—Of conſanguinity.

IN caſe a party makes no teſtamentary diſpoſition of his perſonal property, he is ſaid to die inteſtate [a], the conſequences of which are now to be conſidered.

[a] 2 Bl. Com. 494.

In ancient times the king was, on ſuch event, entitled to take poſſeſſion, by his officers, of the effects, as the *parens patriæ*, and general truſtee of the kingdom, in order that they might be applied in the burial of the deceaſed, in the payment of his debts, and in a proviſion for his wife and children, or if none, then for his next of kin [b]. This prerogative was moſt probably exerciſed in the county court; it was alſo delegated as a franchiſe to many lords of manors, and others, who have, to this day, a preſcriptive right to grant adminiſtration to their inteſtate tenants, and ſuitors, in their own courts baron, and other courts, or, as we have ſeen [c], to grant probate of their wills, in caſe they have made any diſpoſition [d].

[b] 2 Bl. Com. 494. 9 Co. 38. b.

[c] Vid. ſupr. 27.

[d] 2 Bl. Com 494. 9 Co. 37. b.

This

This power was afterwards veſted by the crown in the prelates, who, on account of their ſuperior ſanctity, were, by the ſuperſtition of the times, conceived capable of diſpoſing of the property moſt for the benefit of the deceaſed's ſoul [e]. The effects were, therefore, committed to the ordinary, and he might ſeize and keep them without waſting, and alſo give, alien, or ſell them, at his pleaſure, and diſpoſe of the money in pious uſes. If he did otherwiſe, he violated the truſt repoſed in him as the king's almoner, within his dioceſe [f]. The juriſdiction of proving wills of courſe fell into the ſame channel, ſince it was thought reaſonable that they ſhould be proved to the ſatisfaction of him, whoſe right of diſtribution they effectually ſuperſeded [g].

[e] Perkins, ſect. 486.

[f] Plowd. 277.

[g] 2 Bl. Com. 494.

Whether the ordinary's power of diſpoſition extended to the whole of the perſonal eſtate, or only to one third, after the *partes rationabiles*, or two thirds belonging to the wife and children, were deducted, is a point on which there is a difference of opinion [h]; but this is clear, the truſt, whether more or leſs extenſive, he did not very faithfully execute. He converted to his own uſe, under the name of church and poor, the whole of ſuch property, without even paying the deceaſed's debts. To redreſs ſuch palpable injuſtice the ſtat. of *Weſtminſter* 2. or the 13 *E.* 1. *c.* 19. was paſſed; by which it is enacted, that the ordinary is bound to pay the debts of the inteſtate, ſo far as his goods will extend, in the ſame manner as executors are

[h] 2 Bl. Com. 491—495. 2 Inſt. 33.

bound, in case the deceased has left a will; a use, as Mr. Justice *Blackstone* styles it, more truly pious than any requiem, or mass for his soul [i].

[i] 2 Bl. Com. 495.

Although the ordinary were now become liable to the intestate's creditors, yet the residue, after payment of debts, continued in his hands, to be applied to whatever purposes his conscience might approve. But as it was not sufficiently scrupulous to prevent the perpetual misapplication of the fund, the legislature again interposed, in order to divest him, and his dependants, of the administration. The stat. 31 *E.* 3. *c.* 11. therefore, provides, that in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, and they are thereby put on the same footing in regard to suits, and to accounting as executors appointed by will [k].

[k] 2 Bl. Com. 405, 496. 3 Bac. Abr. 54. Raym. 498.

Such is the origin of administrators: They are the officers of the ordinary, appointed by him in pursuance of the statute, which selects the next and most lawful friends of the intestate. But the stat. 21 *H.* 8. *c.* 5. allows the ecclesiastical judge a little more latitude, and empowers him to grant administration, either to the widow, or next of kin, or to both of them, at his own discretion. And where two or more persons are in the same degree of kindred, in case they apply, gives him his election to accept whichever he pleases.

Letters

Letters of adminiſtration, then, muſt be granted by the ordinary to ſuch perſons, as the ſtatutes 31 *E.* 3. & 21 *H.* 8. point out [l], that is, according to the former ſtatute, to the next and moſt lawful friends of the inteſtate; according to the latter, to the widow, and next of kin, or both, or either of them.

[l] 2 Bl. Com. 504.

What parties fall within the firſt deſcription, it was the province of the courts of common law to determine [m], and they have interpreted ſuch friends to mean in the firſt place the huſband, if he were not entitled at common law, and, ſecondly, the next of blood, under no legal diſabilities [n].

[m] 3 Bac. Abr. 54. 11 Vin. Abr. 93. 1 Ventr. 218.

[n] 2 Bl. Com. 496. 9 Co. 39. b.

Firſt, the ordinary is bound to grant adminiſtration of the effects of the wife to the huſband [o].

[o] 11 Vin. Abr. 86.

Various opinions have indeed been held with regard to the huſband's title to adminiſter. Some have maintained that he has no ſuch excluſive right, either at common law, or by virtue of the ſtatutes; but that the ordinary may refuſe the adminiſtration to him, and may elect to grant it to the next of kin of the wife [p]. By others, it has been aſſerted, that he is entitled under the equity of the ſtat. of the 21 *H.* 8. whereby the ordinary is directed to grant adminiſtration of the huſband's effects to the wife, or next of kin, or to either [q]. By a third claſs, it has been inſiſted, that although the huſband is not expreſsly named in the ſtat. 31 *E.* 3, nor does he anſwer the deſcription of next

[p] Cro. Car. 106.

[q] 11 Vin. Abr. 84. in not.

next of kin of the wife, yet he is included under the denomination of the next and moſt lawful friend of the inteſtate; and that thus he ſupports his claim, not on the common law, nor, as deſcribed *eo nomine*, by the ſtatute, but as comprehended within its general proviſion [r]. By a fourth, it is alleged, and the doctrine is recognized, in a recent caſe, by very high authority [s], that he is entitled at common law, *jure mariti*, and that his right is not derived from any of the ſtatutes, but, on the contrary, is ſuppoſed by them, and exiſts independently of them all. However, to ſpeculate on theſe points is uſeleſs to the preſent purpoſe, ſince the huſband's right to adminiſter, on whatever foundation, is now beyond all queſtion eſtabliſhed.

[r] 1 Salk. 36. 11 Vin. Abr. 73. 84. in not. 116. 1 Show. 327. 1 P.Wms. 44. 4 Burn Eccl. L. 235.

[s] Watt v. Watt. 3 Veſ. jun. 246, 247. Vid. alſo Com. Dig. Admor. B. 6. 282. 2 Bl. Com. 515. 4 Co. 51. b. Roll. Abr. 910. 4 Burn Eccl. L. 264.

The ſtat. 29 *Car.* 2. *c.* 3. contains a clauſe, that the ſtatute of diſtributions, the 22 & 23 *Car.* 2. *c.* 10. hereafter to be diſcuſſed, ſhall not prejudice ſuch title of the huſband, under an apprehenſion that it might be conſidered to be thereby affected.

Such is the general right of the huſband to the adminiſtration of the wife's effects; but this right may, in certain caſes, be controlled or varied [u]. If the huſband parts with all his intereſt in his wife's fortune, he ſhall not be entitled to the adminiſtration; as, where a wife had a power to make a will and diſpoſe of her whole eſtate, and,

[u] 3 Bac. Abr. 55. in not. Com. Dig. Admor. B. 6.

though, ſtrictly ſpeaking, ſhe made no will, but rather an appointment capable of operating only in equity, the court held that it was for the ſpiritual juriſdiction to determine to whom to grant adminiſtration, and refuſed to interpoſe in favour of the huſband [w].

[w] 4 Burn Eccl. L. 232. Stra. 1111.

So where a feme covert, by virtue of her power to diſpoſe of her eſtate, deviſed a term for years to J. S. adminiſtration was granted to the deviſee [x].

[x] 11 Vin. Abr. 87. Prac. Chan 480. Gilb. Eq. Rep. 143.

On the other hand, where the return to a *mandamus* to grant adminiſtration to a huſband ſtated, that, by articles before marriage, it was agreed that the wife ſhould have power to make a will, and diſpoſe of a leaſehold eſtate, and purſuant to this power, ſhe had made a will, and appointed her mother executrix, who had duly proved the ſame, it was objected that ſhe might have things in action not covered by the deed, and that the huſband was, at all events, entitled to an adminiſtration in reſpect to them, though equity would controul it in reſpect to the leaſe; the court allowed the objection, and granted a peremptory *mandamus* [y].

[y] 4 Burn Eccl. L. 232. Stra. 891.

In caſe of a limited probate, granted to the executor of a married woman, as above mentioned, the huſband is entitled to adminiſtration of the other part of her property, which is called an *adminiſtration cæterorum*.

Vid. ſupr. 43.

Secondly,

Secondly, the ordinary is to grant adminiſtration of the effects of the huſband to the widow, or next of kin; but he may grant it to either, or both, at his diſcretion [z]. If the widow renounce adminiſtration, it ſhall be granted to the children, or other next of kin of the inteſtate, in preference to creditors.

[z] Vid. 11 Vin. Abr. 92.

The ordinary may grant adminiſtration *quoad* part to the wife, and as to the other part, to the next of kin; for in ſuch caſe there can be no ground to complain, as the ordinary was not bound to grant it excluſively to either [a].

[a] 11 Vin. Abr. 71. 3 Bac. Abr. 55. Com. Dig. Admor. B. 6. 1 Salk. 36.

It now becomes neceſſary to inquire, who are ſuch next of kin as ſhall be thus entitled.

Conſanguinity or kindred is defined to be *vinculum perſonarum ab eodem ſtipite deſcendentium*, the connection or relation of perſons deſcended from the ſame ſtock or common anceſtor. This conſanguinity is either lineal, or collateral [b].

[b] 2 Bl. Com. 202.

Lineal conſanguinity is that which ſubſiſts between perſons of whom one is deſcended in a direct line from the other, as between J. S. the *propoſitus* in the table of conſanguinity, and his father, grand-father, great-grand-father, and ſo upwards, in the aſcending line, or between J. S. and his ſon, grandſon, and great-grandſon, and ſo downwards, in the direct deſcending line. Every generation in this lineal direct conſanguinity conſtitutes a dif-

a different degree, reckoning either upwards, or downwards. The father of J. S. is related to him in the firſt degree, and ſo likewiſe is his ſon; his grandfire and grandſon, in the ſecond; his great-grandfire and great-grandſon, in the third. This is the only natural way of reckoning the degrees in the direct line, and, therefore, univerſally obtains, as well in the civil, and canon, as in the common law.

Thus this lineal conſanguinity falls ſtrictly within the definition of *vinculum perſonarum ab eodem ſtipite deſcendentium*, ſince lineal relations are ſuch as deſcend one from the other, and both of courſe from the ſame common anceſtor [c].

[c] 2 Bl. Com. 203, 204.

Collateral kindred anſwers to the ſame deſcription. Collateral relations agreeing with the lineal in this, that they deſcend from the ſame ſtock or anceſtor, but, differing in this, that they do not deſcend the one from the other.

Collateral kinſmen are then ſuch as lineally ſpring from one and the ſame anceſtor, who is the *ſtirps* or root, *ſtipes* or common ſtock from which theſe relations are branched out. As if J. S. have two ſons, who have each iſſue; both of theſe iſſues are lineally deſcended from J. S. as their common anceſtor, and they are collateral kinſmen to each other, becauſe they are all deſcended from one common anceſtor, and all have a portion of his

his blood in their veins, which denominates them *conſanguineos*.

Thus the very being of collateral conſanguinity conſiſts in this deſcent from one and the ſame common anceſtor. A. and his brother are related, becauſe both are derived from one father. A. and his firſt-couſin are related, becauſe both are deſcended from the ſame grandfather; and his ſecond-couſin's claim to conſanguinity is this, that they are both derived from one and the ſame great-grandfather. In ſhort, as many anceſtors as a man has, ſo many common ſtocks he has, from which collateral kinſmen are derived. And, as from one couple of anceſtors the whole race of mankind is deſcended, it neceſſarily follows, that all men are in ſome degree related to each other [d].

[d] 2 Bl. Com. 204, 205.

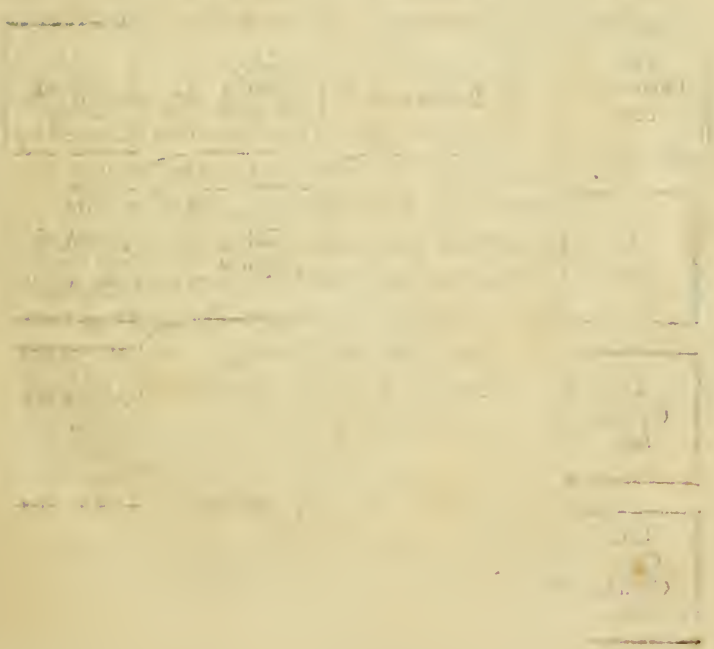
The mode of calculating the degrees in the collateral line, is not that of the canoniſts adopted by the common law, in the deſcent of real eſtates, but conforms to that of the civilians, and is as follows: to count upwards from either of the parties related to the common ſtock, and then downwards again to the other, reckoning a degree for each perſon, both aſcending and deſcending [e], or, in other words, to take the ſum of the degrees, in both lines, to the common anceſtor [f].

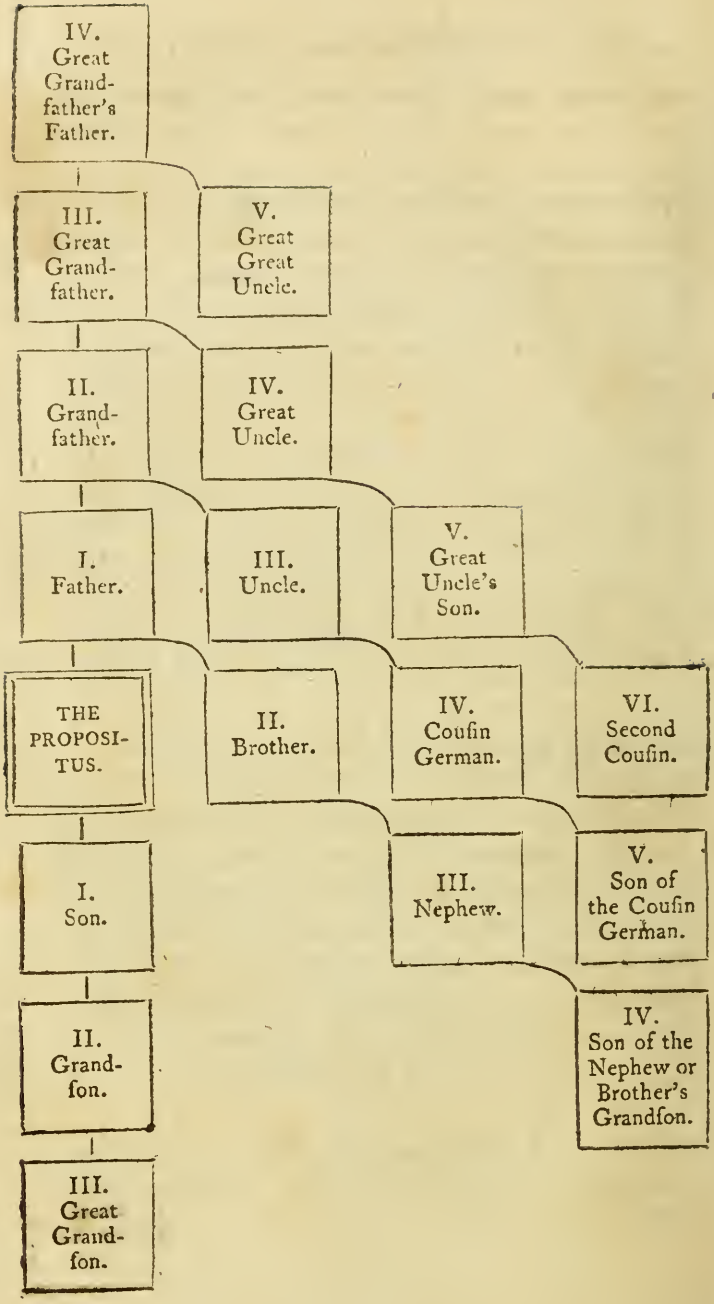
[e] 2 Bl. Com. 207.

[f] Ibid. 12 Edit. not. (4).

Thus, for example, the *propoſitus*, and his couſin-german, are related in the fourth degree.

We




IV. Great Grand-father's Father.
III. Great Grand-father.
V. Great Great Uncle.
II. Grand-father.
IV. Great Uncle.
I. Father.
III. Uncle.
V. Great Uncle's Son.
THE PROPOSI-TUS.
II. Brother.
IV. Coufin German.
VI. Second Coufin.
I. Son.
III. Nephew.
V. Son of the Coufin German.
II. Grand-fon.
IV. Son of the Nephew or Brother's Grandfon.
III. Great Grand-fon.

We ascend, first, to the father [g], which is one degree; and from him to the common ancestor, the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin-german, which is the fourth degree. So, in reckoning to the son of the nephew, or the brother's grandson, we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree [h].

[g] See the table of consanguinity annexed, in which the degrees of collateral consanguinity are computed, as far as the sixth.

[h] 4 Burn Eccl. L. 355 Black. Desc. 41, 42.

Of the kindred, those, we must recollect, are to be preferred, who are the nearest in degree to the intestate, but from among persons of equal degree, in case they apply, the ordinary has the power of making his election [i].

[i] 11 Vin. Abr. 114, 115. Com. Dig. Admor. B. 6.

Of the next of kin, then, first the children, and on failure of them, the father of the deceased, or, if he be dead, the mother is entitled to administration: The parents, indeed, as well as the children, are of the first degree, but the children are allowed the preference [k], then follow brothers [l], then grandfathers [m], and although they are both of the second degree, yet the former are first entitled; next in order are uncles or nephews [n], and, lastly, cousins, and the females of each class respectively [o]. Relations by the father's side and the mother's, in equal degree of kindred, are equally entitled; for,

[k] 11 Vin. Abr. 91, 92. 2 Bl. Com. 504.

[l] 11 Vin. Abr. 93.

[m] 11 Vin. Abr. 93. and in not. Ld. Raym 684. Com. Dig. Admor. B 6. 1 Salk. 38.

[n] 2 Bl. Com. 505. 1 Atk. 455.

[o] 2 Bl. Com. 505.

in this reſpect, dignity of blood gives no preference [p]. So, the half blood is admitted to the adminiſtration as well as the whole [q], for they are the kindred of the inteſtate, and excluded from inheritances of land only on feudal reaſons [r]; therefore, the brother of the half blood ſhall exclude the uncle of the whole blood [s]; and the ordinary may grant adminiſtration to the ſiſter of the half, or the brother of the whole, blood, at his diſcretion [t].

[p] 1 P.Wms. 53.

[q] 11 Vin. Abr. 91. 1 Ventr. 323. 424.

[r] 2 Bl. Com. 505.

[s] 11 Vin. Abr. 85.

[t] 2 Bl. Com. 505.

If a feme covert be entitled, ſhe cannot adminiſter unleſs with the huſband's permiſſion [u], inaſmuch as he is required to enter into the adminiſtration bond, which ſhe is incapable of doing. But, if it can be ſhewn by affidavit, that the huſband is abroad, or otherwiſe incompetent, a ſtranger may join in ſuch ſecurity in his ſtead. In either caſe the adminiſtration is committed to her alone, and not to her jointly with her huſband [w], otherwiſe, if he ſhould ſurvive her, he would be adminiſtrator, contrary to the meaning of the act.

[u] 2 Bl. Rep. 801.

[w] 11 Vin. Abr. 85. 4 Burn Eccl. L. 241. Com. Dig. Admon. D. Sty. 75.

If it were committed to them jointly, during coverture only, it might, perhaps, be good, becauſe, if committed to the wife alone, the huſband, for ſuch period, may act in the adminiſtration with or without her aſſent, and, therefore, the effect of the grant ſeems in either caſe the ſame [x].

[x] 11 Vin. Abr. 85. 4 Burn Eccl. L. 241. Com. Dig. Admon. D. 1 Salk. 306. Vid. Bl. Rep. 801.

If

If the wife be the only next of kin, and a minor, ſhe may elect her huſband her guardian, to take the adminiſtration for her uſe and benefit during her minority; but the grant ceaſes on her coming of age, when a new adminiſtration may be committed to her.

The ſtat. 21 *H.* 8. has alſo expreſsly provided for another caſe than that of actual inteſtacy; namely, where the deceaſed has made a will, and appointed an executor, and ſuch executor refuſes to take out probate [y], in ſuch an event the ordinary muſt grant adminiſtration *cum teſtamento annexo*, with the will annexed, and the duty of ſuch grantee differs but little from that of an executor [z]. He is equally bound to act according to the tenour of the will.

[y] 4 Burn Eccl. L. 228. 11 Vin. Abr. 78. 2 Inſt. 397.

[z] 2 Bl. Com. 504.

So, if one of two executors proves the will and dies, and then the other refuſes, ſuch adminiſtration ſhall be granted.

Vid. ſupr. 44.

The ordinary cannot grant adminiſtration with the will annexed in which an executor is named, until he has either formally renounced his right to the probate, or neglected to appear, on being duly cited to accept, or refuſe the ſame. So, if ſeveral executors are named in the will, they muſt all refuſe or fail to appear, on citation, previous to the grant. After ſuch adminiſtration the executor cannot retract his refuſal during the life-

time of the adminiſtrator, but he may do ſo after the grant has ceaſed by the adminiſtrator's death.

A party, although otherwiſe entitled, may be incapable of the office of adminiſtrator, on account of ſome diſqualification in point of law. The incapacities of an adminiſtrator are not confined to ſuch as have been enumerated in reſpect of executors, but compriſe attainder of treaſon or felony, outlawry, impriſonment, abſence beyond ſea, bankruptcy [a], and, in ſhort, almoſt every ſpecies of legal diſability, for, by the expreſs requiſition of the ſtatute, the ordinary is bound to grant adminiſtration to the next and moſt lawful friends of the inteſtate [b].

[a] 9 Co. 39, b. Com Dig. Admor. (B. 6.) 4 Burn Eccl. 233. 3 Bac. Abr. 56. in not.

[b] Com. Dig. Admor. (B. 6.) 1 Salk. 36.

But coverture is no incapacity, nor is alienage, if qualified, as in the caſe of executors [c]. Even an alien of the half blood may be appointed an adminiſtrator [d].

[c] Com. Dig. Admor. (B. 6.) Cro. Car 9. 1 Brownl. 31.

[d] 11 Vin Abr. 94. 2 Vern. 126.

SECT. II.

Of the analogy of adminiſtrations to probates.

WHAT has been ſtated reſpecting the different juriſdictions relative to probates, of iſſuing a commiſſion or requiſition in caſe the party be in an ill ſtate of health, or reſide at a diſtance; of *bona notabilia*;

tabilia; of the eccleſiaſtical privilege of granting probate, being perſonal and not local [a]; of its devolving on the archbiſhop where the party deceaſed was a biſhop, and on the dean and chapter in caſe of the death or ſuſpenſion of the metropolitan or ordinary; of his being compellable by *mandamus* to grant probate, unleſs he return a *lis pendens* [b]; of caveats, and appeals; of the power of the court of appeal to grant probate where the ſentence is reverſed [c]; of probates being of unqueſtionable validity in courts of common law; of the regiſter's book in the ſpiritual court being evidence where the probate is loſt [d]; and, if iſſue be taken thereon, of its being triable by a jury, applies equally to letters of adminiſtration.

[a] 4 Burn Eccl. 241.

[b] 4 Burn Eccl. L. 230. Com. Dig. Admor. (B. 7.) 11 Vin. Abr. 74. 202. 4 Inſt. 335.

[c] 11 Vin. Abr. 76 Com. Dig. Admor. (B. 2.) 2 Roll. Abr. 233.

[d] 4 Burn Eccl. L. 248. 1 Lev. 101.

SECT. III.

In regard to the acts of a party entitled, previous to the grant.

ALTHOUGH an executor may perform many acts before he proves, yet a party can do nothing as adminiſtrator, till letters of adminiſtration are iſſued, becauſe the former derives his authority from the will, and not from the probate; the latter owes his entirely to the appointment of the ordinary [a].

[a] 11 Vin. Abr. 202. 4 Burn Eccl. L. 241. Salk. 301.

It has, indeed, been held, that a party before adminiſtration may file a bill in chancery, although he cannot commence an action at law [b].

[b] 4 Burn Eccl. L. 242. Barnadiſt. 320.

But by ſtat. 37 *Geo.* 3. *c.* 90. *ſ.* 10. if a party adminiſter, and omit to take out letters of adminiſtration within ſix months after the inteſtate's death, he incurs the penalty of fifty pounds [c].

[c] Vid. ſupr. 32. 41.

SECT. IV.

Practice in regard to adminiſtrations.

LETTERS of adminiſtration do not iſſue till after the expiration of fourteen days from the death of the inteſtate, unleſs for ſpecial cauſe, as that the goods would otherwiſe periſh, the judge ſhall think fit to decree them ſooner [a].

[a] 4 Burn Eccl. L. 242.

On taking out letters of adminiſtration the party ſwears that the deceaſed made no will, as far as the deponent knows or believes, and that he will truly adminiſter the goods, chattels, and credits, by paying the deceaſed's debts, as far as the ſame will extend, and the law charge him; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the ſame into the regiſtry of the ſpiritual court, at the time aſſigned him by the court, and to render

a juſt account of his adminiſtration, when lawfully required.

And, purſuant to the ſtat. 21 *H.* 8. *c.* 5. and the 22 & 23 *Car.* 2. *c.* 10. he enters into a bond with two or more ſureties conditioned for the making, or cauſing to be made, a true and perfect inventory of all and ſingular the goods, chattels, and credits of the deceaſed, which have or ſhall come to the hands, poſſeſſion, or knowledge, of the adminiſtrator, or into the hands or poſſeſſion of any other perſon or perſons for him; and for exhibiting the ſame into the regiſtry of the ſpiritual court, at or before the end of ſix months; and for well and truly adminiſtering, according to law, ſuch goods and chattels; and farther, for the making a true and juſt account of his adminiſtration, at or before the end of twelve months; and for delivering and paying all the reſt and reſidue of the goods, chattels, and credits, which ſhall be found remaining on his accounts, (the ſame being firſt examined and allowed of by the judge of the court), unto ſuch perſon or perſons reſpectively, as the judge by his decree or ſentence, purſuant to the ſtatute of diſtribution, ſhall limit and appoint; and, if it ſhall thereafter appear, that any will was made by the deceaſed, and the executor therein named exhibit the ſame into the court, making requeſt to have it allowed and approved accordingly, for the adminiſtrators rendering and delivering, on being thereunto required, (approbation of ſuch teſtament

being firſt had, and made), the letters of adminiſtration in the court.

When adminiſtration has been once committed to any of the next of kin, others, even in the ſame degree of kindred, have, during the life of the adminiſtrator, no title to a ſimilar grant; ſo different is this caſe from that of an executor, who has a right to probate, though it has been already taken out by his co-executor. The maxim, "*qui* "*prior eſt tempore, potior eſt jure*," applies in the former, but not in the latter, inſtance [a].

[a] 11 Vin. Abr. 116. 1 Ventr. 218.

SECT. V.

Of ſpecial and limited adminiſtrations.

THERE are alſo various claſſes of adminiſtrations, which, although not founded on the letter of any of the abovementioned ſtatutes, fall within their ſpirit, and intendment [a]. As, if no executor be named in the will, the clauſe for ſuch appointment being wholly omitted, or where a blank is left for his name, adminiſtration with the will annexed ſhall be granted [b].

[a] 4 Burn Eccl. L. 237. 11 Vin. Abr. 94. Plowd. 279. 2 P. Wm. 582. 589, 590.

[b] 11 Vin. Abr. 69. Com. Dig. Admor. (B. 1.)

Or, if the executor die in the life-time of the teſtator [c], or if the teſtator name the executor of B. to

[c] 11 Vin. Abr. 85. Sty. 147.

to be his executor, and die in the life-time of B. for till B.'s death he is in effect inteſtate [d].

[d] Com. Dig. Admor. (B. 1.)

Or, if he name an executor to have authority after a year from his death, for during the year there is no executor [e], and in ſuch caſes adminiſtration ſhall be granted in the interval.

[e] Plowd. 279. 281. b.

So, if the executor be incapable of the office, the party is ſaid to die *quaſi inteſtatus*, and the ordinary muſt grant adminiſtration.

So, in all the above-mentioned inſtances, if there be a reſiduary legatee, adminiſtration is, in general, granted to him in excluſion of the next of kin, becauſe in that caſe the next of kin hath no intereſt in the property, and the preſumption of the ſtatute, that the teſtator would have given it to him cannot exiſt, where ſuch a legatee is appointed [f].

[f] 11 Vin. Abr. 90. 94.

If ſeveral perſons are entitled to the reſidue, it may be granted to any of them [g]; and if it be thus granted, the other reſiduary legatees have no claim to a ſubſequent grant in the life-time of the grantee.

[g] Com. Dig. Admor. (B. 6.) 2 Jon. 162. 11 Vin. Abr. 94.

Such adminiſtration may be alſo granted, although it be uncertain whether there will eventually be a reſidue, or not [h].

[h] Com. Dig. Admor. (B. 6.) 2 Lev. 56. 1 Ventr. 219.

Of this ſpecies alſo is an adminiſtration *durante minoritate*, or during the infancy or minority of an

an executor, or a party entitled to adminiſtration [i].

[i] 1 Com. Dig. Admon. (F.) 11 Vin. Abr. 105.

A diſtinction exiſts in the ſpiritual court between an infant and a minor. The former is ſo denominated if under ſeven years of age; the latter from ſeven to twenty-one. The ordinary *ex officio* aſſigns a guardian to an infant. The minor himſelf nominates his guardian, who then is admitted in that character by the judge. According to the practice of the court, the guardianſhip in either caſe is granted to the next of kin of the child, unleſs ſufficient objection to him be ſhewn, and adminiſtration is committed to ſuch appointee for the uſe and benefit of the infant or minor.

Although, as we have ſeen, an adminiſtration during the minority of an infant executor was, antecedently to the ſtat. 38 *Geo.* 3. *c.* 87. determined on his attaining the age of ſeventeen, yet adminiſtration during the minority of an infant, next of kin was always of force until his age of twenty-one; on the principle, that the authority of an adminiſtrator is derived from the ſtat. of 31 *Ed.* 3. *c.* 11. which admits only of a legal conſtruction, and therefore it was held he muſt be of the legal age of twenty-one, before he is competent; but the executor comes in by the act of the party, and that he ſhould be capable of the executorſhip at the age of ſeventeen, was in conformity to other proviſions of the ſpiritual law [k]. And alſo, which was the more forcible reaſon, becauſe the ſtatute

[k] 4 Burn Eccl. L. 238, 239. Ld. Raym. 667. Com. Dig. Admon. (F.)

ſtatute of diſtributions requires adminiſtrators to give a bond, which an infant is incapable of doing [k].

[k] 11 Vin. Abr. 100, 101. 3 Bac. Abr. 13. Harg. Co. Litt. 89. b. Note 6.

But now by the above-mentioned ſtat. 38 *Geo.* 3. *c.* 87. reciting, that inconveniences aroſe from granting probate to infants under the age of twenty-one, it is enacted, that where an infant is ſole executor, adminiſtration with the will annexed ſhall be granted to the guardian of ſuch infant, or to ſuch other perſon as the ſpiritual court ſhall think fit, until ſuch infant ſhall have attained the full age of twenty-one years, at which period, and not before, probate of the will ſhall be granted to him.

If adminiſtration be granted to ſuch guardian for the uſe and benefit of ſeveral infants, it ceaſes on the eldeſt attaining twenty-one.

If there be ſeveral infant executors, he who firſt attains the age of twenty-one years ſhall prove the will, and the adminiſtration ſhall ceaſe [l]: but adminiſtration granted during the minority of ſeveral children will not expire on the marriage of one of them to a huſband of full age. Nor, if an infant be executrix, ſhall it be determined by her taking a huſband who is of age. Nor, if there be ſeveral infants, by the death of one of them [m].

[l] 4 Burn Eccl. L. 240.

[m] Sed vid. Com. Dig. Admon. (F.) and 5 Co. 29. b.

If there be two executors, one of whom has attained the age of twenty-one years, and the other not,

not, adminiſtration ſhall not be granted during the minority of him that is under age, becauſe the former may execute the will [n].

[n] 4 Burn Eccl. L. 240. 1 Brownl. 46. 11 Vin. Abr. 99. 1 Mod. 47.

According to other authorities [o], adminiſtration ſhall in ſuch caſe be granted to the one executor during the minority of the other; but they are not warranted by modern practice.

[o] 11 Vin. Abr. 97, 98 99. 3 Bac. Abr. 13. 2 Lev. 239, 240. 2 Jo. 119. Yelv. 130.

This adminiſtration ought not to be committed to a party who is very poor, or in diſtreſſed circumſtances, though the guardian or next of kin to the infant. When the court of chancery ſees reaſon to think that ſuch adminiſtrator will waſte, or miſapply the effects of the inteſtate to the prejudice of the infant, for whom he is merely a truſtee, that court will appoint a receiver of the perſonal eſtate, notwithſtanding the grant of adminiſtration [p].

[p] 11 Vin. Abr. 100. Barnard. 23, 24.

It has been held by ſome, that if ſuch adminiſtrator continues the poſſeſſion of the goods after the full age of the executor, he becomes an executor *de ſon tort*; but this is denied by others, and their opinion ſeems to be the more correct, becauſe he came to the poſſeſſion of the goods lawfully [q].

[q] 11 Vin. Abr. 92. 1 Sid. 57.

In this claſs is alſo to be ranked adminiſtration *pendente lite*, while the ſuit is pending [r]; and it may be granted, whether the ſuit reſpects a will, or the right of adminiſtration [s]. But it is never granted till a plea in the cauſe has been given in, and admitted.

[r] 4 Burn Eccl. L. 237.

[s] 3 Bac. Abr. 56. 2 P. Wms. 576. 11 Vin. Abr. 105.

Nor

Nor will the court of chancery, generally ſpeaking, in ſuch caſe interfere, and appoint a receiver during the litigation [t].

[t] 4 Burn Eccl. L. 238. 1 Vef. 325.

Of the ſame ſpecies alſo is adminiſtration grounded on the incapacity of the next of kin at the time of the inteſtate's death, ariſing, for inſtance, from attaint, or excommunication, madneſs, or bankruptcy. If ſuch incapacity be afterwards removed, ſuch adminiſtration may be avoided [u].

[u] Com. Dig. Admor. (B. 1.) Salk. 36.

To this deſcription alſo muſt be referred adminiſtration granted at common law, *durante abſentiâ*, during the abſence of the executor, or next of kin, from the kingdom; and it of courſe ceaſes on the appearance of the executor, or next of kin, and his taking out probate, or adminiſtration.

Under this head alſo is compriſed adminiſtration granted to a creditor: ſuch adminiſtration in general is warranted only by cuſtom, and not by any expreſs law, and may be granted where it is viſible the next of kin cannot derive any benefit from the eſtate; but that is to be underſtood only where they refuſe the grant, and the courſe is for the ordinary to iſſue a citation for the next of kin in ſpecial, and all others in general, to accept or refuſe letters of adminiſtration, or ſhew cauſe why the ſame ſhould not be granted to a creditor [w].

[w] 4 Burn Eccl. L. 230. 2 Bl. Com. 505. Salk. 38. Com. Dig. Admor. (B. 6)

And by the aforeſaid ſtat. 38 *Geo.* 3. *c.* 87. if after the expiration of twelve calendar months from

from the teſtator's death, the executor to whom probate hath been granted ſhall be reſiding out of the juriſdiction of his majeſty's courts, on application of any creditor, next of kin, or legatee, grounded on an affidavit, in the form therein ſpecified, ſtating the nature of his demand, and abſence of the executor, ſuch adminiſtration ſhall be granted.

Of the ſame nature is adminiſtration committed by the ordinary in default of all the abovementioned parties, to ſuch diſcreet perſon as he ſhall approve [x].

[x] 2 Bl. Com. 505.

The juriſdiction of granting theſe adminiſtrations reſults from the ordinary's original power at common law, by which he may make the grant to whom he pleaſes, and, therefore, it is held, that he may in theſe caſes, as not having been expreſsly provided for, impoſe on the grantee ſuch terms as he may think reaſonable [y].

[y] 4 Burn Eccl. L. 237. 2 P. Wms. 582. 589. 590. Hob. 250. 1 Ventr. 219.

Hence, where the executors renounced, and the reſiduary legatee moved for a *mandamus* to the eccleſiaſtical judge to be admitted to prove the will, and have adminiſtration with the will annexed, on ſhewing cauſe the court held, that the matter was left to the election of the ordinary, and diſcharged the rule [z].

[z] 4 Burn Eccl. L. 231. Stra. 956. Com. Dig. Admor. (B. 6.)

So, where a grandfather moved for a *mandamus* to ſuch judge to grant him adminiſtration of the effects

effects of his deceased son during the minority of his grandson, the court refused the application [b].

[b] 4 Burn Eccl. L. 231. Stra. 892.

On the same principle, where, on the renunciation of the next of kin, several creditors apply for administration, though the court may prefer any one of them, yet on the petition of the others, it will compel him to enter into articles, to pay debts of equal degree in equal proportions, without any preference of his own.

There may be also a limited or special administration committed to the party's care, namely, of certain specific effects, as of a term for years, and the like, and the rest may be committed to others, or for effects of the intestate in this county, or place, to one, and for effects in that county, or place, to another; and as well in general cases, as in the case above stated, of the wife and next of kin [c]. But several administrations cannot be granted in respect of one and the same thing; as a house, or a bond, or any other debt. For it would be absurd, that two persons should have a distinct right to an individual chattel, or *chose in action* [d]. In respect however to creditors, such several administrators are all considered as one person, and may be sued accordingly [e].

[c] Com. Dig. Admor. (B. 7.) Roll. Abr. 908. Vid. supr. 60.

[d] 3 Bac. Abr. 57. Roll. Abr. 908. Salk. 36.

[e] 11 Vin. Abr. 139. Cro. Car. 293

Administration also may be granted on condition, as where a former grantee is outlawed, and in prison beyond sea, it may be committed to another, but

but so as if the first grantee shall return he shall be entitled to administer [f].

[f] Com. Dig. Admor. (B 7.) Roll. Abr. 908. 11 Vin. Abr. 70.

The ordinary also, in default of persons entitled to the administration, may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, and thus assume the office of an executor, or administrator in respect to the collecting of them; but the grantee of such letters cannot sell the effects without making himself an executor *de son tort*. The ordinary has no such authority, and therefore he cannot confer it on another [g].

[g] 4 Burn Eccl. L. 241. 11 Vin. Abr. 87. 2 Bl. Com. 505.

If a bastard, who, as *nullius filius*, hath no kindred, or any other person having no kindred, die intestate, and without wife or child, it hath formerly been holden, that the ordinary could seize his goods, and dispose of them to pious uses; but now it seems settled, that the king is entitled to them as *ultimus hæres*; but in such case it is the practice to transfer the royal claim by letters patent, or other authority, from the crown, with a reservation, as it is said, of a tenth or other small proportion of the property, and then the ordinary of course grants to such appointee the administration [h].

[h] Com. Dig. Admor. (A) 11 Vin. Abr. 88. 3 P. Wms. 33. 1 Wooddes 398.

It has, indeed, been asserted, that such letters patent are merely in the nature of a recommendation; and that though it be usual for the ordinary to

to admit such patentee, yet it is rather out of respect to the king, than strictly of right [1].

[1] 11 Vin. Abr. 86. 1 Salk. 37.

Administration may also be granted to the attorney of all executors, or of all the next of kin, provided they reside out of the province; but if the effects are under twenty pounds, such administration may be granted, whether they are so resident, or not.

SECT. VI.

Of administrations to intestate seamen, and marines.

WITH regard to the administration of the wages, pay, prize-money, or allowance of money, of such petty officers, and seamen, non-commissioned officers of marines, and marines, as are abovementioned, in respect of services in his majesty's navy by the before cited stat. 32 *Geo.* 3. *c.* 34. it is enacted, that the party claiming such administration shall send a note to the inspector of seamen's wills, stating the name of the deceased, the name of the ship or ships to which he belonged, and that the party has been informed of his death, and requesting the inspector to give such directions as may enable him to procure letters of administration to the deceased; on receipt of which, the inspector shall transmit the form of a letter, containing a list of

the degrees of kindred to the tenth degree inclusive, with blanks for the time and place of the intestate's birth, and the ship he belonged to, and that the party had obtained information of his death, with blanks for the place where, and the time when it happened, without leaving a will, to the best of the party's knowledge and belief; and applying to the inspector for a certificate, to enable such party to obtain letters of administration to the deceased's effects, with also a blank for his degree of kindred; and stating, that no one, to the best of his knowledge and belief, was of a nearer degree at the time of the intestate's death, who died (with a blank, in which to insert whether) bachelor or widower; to which form shall be subjoined a blank certificate, to be signed by two reputable housekeepers of the parish where the party applying is resident, of their knowledge of him, and of their belief, that what he states is true; and also another certificate, to be signed by the minister of the parish, and two of the churchwardens, or two elders of the same, as the case may be, certifying that such two housekeepers are resident in the parish, and of good repute; and also stating, that if the party applying is the widow of the deceased, she must forward with such certificate an extract from the parish register, or some other authentic proof of her marriage, and containing also the same directions as annexed to the second certificate subjoined to the abovementioned check [a], in regard to proof of the deceased's death, if he died after he had left the naval service, in regard to mentioning the name of a proctor to be

[a] Supra 32.

be employed in obtaining the adminiſtration: and that the application, when filled up and atteſted, ſhall be ſent by the general poſt under cover, directed to the treaſurer or paymaſter of his majeſty's navy, London. And on the receipt of ſuch paper, the party claiming the adminiſtration ſhall fill up the blanks in the firſt part of the paper, and ſhall ſubſcribe the ſame, and two inhabitants of the pariſh within which the party ſhall reſide, ſhall ſign the firſt certificate on the paper, having previouſly filled up the blanks therein, after which the miniſter, and two churchwardens (if in England), and two elders (if in Scotland), ſhall ſign the ſecond certificate on the aforeſaid paper: and the paper being in all things completed, ſhall be returned, addreſſed to the treaſurer or paymaſter of his majeſty's navy, London, and he on receiving the ſame ſhall direct the inſpector to examine it, and make ſuch enquiry relative thereto as may appear to him neceſſary; and, if he ſhall be ſatisfied, to make out a certificate, ſtating the application of the party to his office, containing the party's deſcription, and ſtating whether he is ſole, or one of the next of kin of the deceaſed, the original place of reſidence of the deceaſed, and whether ſeaman or marine, and the name of the ſhip he belonged to, and that he died inteſtate, and whether bachelor or widower; together with the time of his death; and that it appearing that no will of the deceaſed has been lodged in the office, he, therefore, grants ſuch abſtract of the application, and certifies, that he believes what is ſtated to be true; and that ſuch party

may obtain letters of adminiſtration to the effects of the deceaſed, which appear not to exceed a ſum ſpecified, provided ſuch party is otherwiſe entitled thereto by law: to which certificate there ſhall be ſubjoined a notice, that previous commiſſion or requiſition is to be addreſſed agreeably to the ſuperſcription of the within cover, in which the ſame is to be incloſed, and forwarded by the proctor, and when the commiſſion or requiſition ſhall be returned to the office, it will be forwarded to him, and he is then to ſue out letters of adminiſtration, and ſend them to the inſpector with his charges noted thereon. And then this certificate the inſpector ſhall ſign, and addreſs to a proctor in Doctors Commons, and ſhall at the ſame time incloſe therein a letter addreſſed to the miniſter and churchwardens, or elders (as the caſe may be), of the pariſh, within which the party then reſides, franked by the treaſurer, paymaſter, or inſpector, in which the previous commiſſion or requiſition is to be incloſed, informing him of the application atteſted by him, and the two churchwardens, or elders, and requiring him to ſwear the party accordingly, provided he anſwers the deſcription contained in ſuch commiſſion or requiſition; and when the ſame is executed, to return it to the pay office, and to ſpecify and deſcribe the receiver general of the land tax, collector of the cuſtoms, or of the exciſe, or the clerk of the check, whoſe abode is neareſt to the party applying, when ſuch perſon will be directed to pay him the wages due to the deceaſed; and deſiring the miniſter, if the application

tion was not atteſted by him as therein ſtated, to return the incloſed commiſſion or requiſition, that means may be taken to diſcover the impoſition; and the proctor ſhall immediately, on receipt of ſuch certificate incloſed in ſuch letter, ſue out the previous commiſſion or requiſition, and incloſe it, with inſtructions for executing the ſame, in ſuch letter, and ſhall tranſmit the letter by the general poſt to the miniſter and churchwardens, or elders, and they immediately on the receipt thereof ſhall proceed to the execution of ſuch commiſſion or requiſition, and the ſame being ſo executed, ſhall tranſmit it to the treaſurer or paymaſter; and if the party applying ſhall reſide at a diſtance from the place where the wages, pay, prize-money, or other allowance of money due the deceaſed, are payable, they ſhall ſpecify and deſcribe one of the perſons enumerated in the letter, who may reſide neareſt to the party ſo applying, and the treaſurer or paymaſter ſhall immediately on the receipt thereof ſend the previous commiſſion or requiſition, ſo executed, to ſuch proctor, who ſhall, without delay, ſue out letters of adminiſtration in favour of the party ſo applying, to the eſtate and effects of ſuch deceaſed perſon. The ſtatute alſo preſcribes ſimilar regulations in regard to the grant of adminiſtration to a creditor of ſuch inteſtate.

The proviſions of this act, I have already mentioned, are extended by the ſtat. 32 *Geo.* 3. *c.* 67. to Ireland.

SECT. VII.

Of adminiſtrations in caſe of the death of the adminiſtrator, or of the executor inteſtate.

I AM now to conſider the effect of the death of an executor, or adminiſtrator with regard to the adminiſtration.

Where adminiſtration is granted to two, and one dies, the ſurvivor ſhall be ſole adminiſtrator [a]; for it is not like a letter of attorney to two, where, by the death of one the authority ceaſes, but it is an office analogous to that of an executor, which ſurvives [b].

[a] 4 Burn Eccl. L. 241. Ca. Temp. Talb. 127.

[b] 3 Bac. Abr. 56. 2 Vern. 514. 11 Vin. Abr. 69. Com. Dig. Admor (B. 7.)

An adminiſtrator is merely the officer of the ordinary, preſcribed to him by act of parliament, in whom the deceaſed has repoſed no truſt, and, therefore, on the death of that officer it reſults to the ordinary to appoint another. And, if A.'s executor die inteſtate, the adminiſtrator of ſuch executor has clearly no privity or relation to A. ſince he is commiſſioned to adminiſter the effects only of the inteſtate executor, and not of the original teſtator. In both theſe caſes, therefore, it is neceſſary for the ordinary to commit another adminiſtration [c].

[c] Com. Dig. Admor. (B. 6.) 4 Burn Eccl. L. 241. 1 Roll. Abr. 907. 2 Bl. Com. 506.

But, with regard to the ſpecies of adminſtration to be thus granted, a diſtinction ariſes between the caſe

caſe where the executor, or next of kin had before his death taken out probate, or letters of adminiſtration; and where he had omitted to do ſo.

If an executor die before probate, his executor cannot prove, or take on himſelf the execution of the will of the original teſtator, becauſe he is not thereby named executor to ſuch teſtator. He only can prove the will, who by the will is conſtituted executor. The omiſſion of the firſt executor to prove the ſame on his death determines, although it does not avoid the executorſhip, or vacate the acts, which he has performed in ſuch character [d].

[d] 11 Vin. Abr. 67. 90. 111. 1 Salk. 308, 309. Cro. Jac. 614. pl. 4.

When this caſe occurs, an adminiſtration muſt be granted, and the grantee ſhall be the repreſentative of the party who originally died: but it ſhall be an immediate adminiſtration, that is, without making mention of the executor, whether he did in point of fact adminiſter, or not; becauſe adminiſtering is an act in *païs*, of which the ſpiritual court cannot take notice. The ordinary muſt commit adminiſtration, as it appears to him judicially: and it can thus appear only by the probate [e].

[e] 1 Salk. 308. 3 Bac. Abr. 19.

In like manner, if A. dies inteſtate, and B. is intitled to adminiſter, and dies before he takes out adminiſtration, an immediate adminiſtration ſhall be committed: in ſuch caſe it ſhall be granted to the repreſentatives of B. if the only party in diſtribution, in preference to the repreſentatives of A. becauſe by the ſtatute of diſtributions B. had a

veſted intereſt, and in ſuch grant the eccleſiaſtical court regards the property; and therefore if a ſon die inteſtate, without wife or child, leaving a father, and the father ſhall himſelf die before he takes out adminiſtration, it ſhall be committed to his repreſentatives [f]; and ſo it has been held in caſe the wife die inteſtate, and the huſband die before he takes out adminiſtration, it ſhall be granted to the repreſentatives of the huſband; but it is now ſettled that the court is in the latter inſtance bound by ſtat. 31 *E.* 3. to grant adminiſtration to the next of kin of the wife, and then he ſhall be a truſtee in equity for the huſband's repreſentatives [g].

[f] 11 Vin. Abr. 88. pl. 25. 1 P. Wms. 381. vid. alſo Com. Dig. Admor. (B. 6.) Show. 2. 25. vid. 1 Vern. 403.

[g] 3 Atk. 526. 4 Burn Eccl. L. 235. 11 Vin. Abr. 88. pl. 27. 1 Vef. 16. 1 Wilſ. 169. 1 P. Wms. 382. not. 1.

If the deceaſed executor hath taken out probate, or the deceaſed's next of kin adminiſtration, then another ſpecies of adminiſtration, which hath not hitherto been mentioned, becomes neceſſary, namely, an adminiſtration *de bonis non*, that is, of the goods of the deceaſed left unadminiſtered by the former executor, or adminiſtrator, by the grant of which, ſuch adminiſtrator *de bonis non* becomes the only perſonal repreſentative of the party originally deceaſed [h].

[h] 11 Vin. Abr. 111. 2 P. Wms. 34. Com. Dig. Admor. (B 1.) Plowd. 279. 3 Bac. Abr. 19.

Adminiſtration of either ſpecies is, generally ſpeaking, granted to the next of kin of ſuch party. But in caſe there be a reſiduary legatee, it ſhall be granted to him in preference to ſuch next of kin on the principle above ſtated, becauſe the next of kin has then no intereſt in the property [i]. Thus where A. made C. executor and reſiduary legatee,

[i] Com. Dig. Admor. (B. 6.) 1 Ventr. 219. 2 Lev. 56. 3 Bac. Abr. 19.

and B. made C. executor without giving him the surplus; and C. afterwards died intestate: it was held, that the administrator of C. should be administrator *de bonis non* of A. but that the next of kin of B. should be administrator *de bonis non* of B. [k]. If the residue be bequeathed to several persons, such administration may be granted to all or either of them, as in the case of an original administrator, although there be no present residue [l]. But for such purpose there must be a complete disposition of the property [m]. If the executor be himself residuary legatee, although he refused, or *before* he proved the will, died *intestate*, an immediate administration with the will annexed shall be granted to his administrator [n]. If an executor be residuary legatee, although he refused or died *before* probate, *leaving a will*, his executor will be entitled to such administration [o]. If an executor and residuary legatee, *after* probate, die intestate, administration *de bonis non*, with the will annexed of the testator, shall be granted to the administrator of such executor. If a feme covert executrix die intestate, then as to the effects which she had in that capacity, administration shall be granted to the residuary legatee if any, or to the next of kin of the testator. If she were herself residuary legatee, it shall be granted to her husband [p].

[k] 11 Vin. Abr. 87. Prec. Chan. 567.

[l] Com. Dig. Admor. (B. 6.) Vid. 2 Lev. 56.

[m] 11 Vin. Abr. 89. Jo. 225.

[n] 11 Vin. Abr. 88. 92. 2 Roll. Rep. 158.

[o] Com. Dig. Admor. (B. 6.) Dy. 372.

[p] 11 Vin. Abr. 89. 91. 111. 2 P. Wms. 161. 4 Burn Eccl. L. 236. 3 Salk. 21. 11 Vin. Abr. 90, 91. 95. 108. Fitzgibb. 203. Poph. 106.

Where there are two executors, of whom only one proves, and dies, and then the other renounces, the executors of the acting executor have no concern with the administration of the goods unadministered,

niſtered, but the ſame ſhall be granted to the next of kin, or reſiduary legatee of the firſt teſtator [p].

[p] Com. Dig. Admor. (B. 1.) Salk. 311.

So, if there be two executors, one of whom appoints an executor, and dies, and the ſurvivor dies inteſtate, the executor of the executor ſhall not intermeddle with the firſt teſtator's effects; for the power of his teſtator was determined by his death, and the executorſhip veſted ſolely in the other executor as ſurvivor.

So where an adminiſtrator is appointed during the minority of the executor of an executor, he has no authority to intermeddle with the effects of the original teſtator. The ordinary, in either caſe, ſhall commit adminiſtration *de bonis non*, to the next of kin or reſiduary legatee of the original teſtator [q].

[q] 11 Vin. Abr. 67. in not. 89. Off. Ex. 101. Cro. Eliz. 211. 3 Bac. Abr. 13.

SECT. VIII.

How adminiſtration ſhall be granted—when void—when voidable—of repealing the ſame—how a repeal affects meſne *acts.*

ADMINISTRATION is generally granted by writing under ſeal; it may alſo be committed by entry in the regiſtry, without letters *ſub ſigillo*; but it cannot be granted by parol [a].

[a] 11 Vin. Abr. 70. 1 Show. 408, 409. Godolph. 231. Com. Dig. Admor. (B 7.)

In

In letters of adminiſtration, the ſtyle of juriſdiction, as well as the name of the ordinary, ſhall be inſerted [b].

[b] 4 Burn Eccl. L. 229

A party may refuſe the office, nor can the ordinary compel him to accept it [c].

[c] 4 Burn Eccl. L. 233.

Where adminiſtration is improperly granted, a diſtinction occurs between adminiſtrations which are void, and ſuch as are only voidable.

If there be an executor, and adminiſtration be granted before probate, and refuſal, it ſhall be void on the will's being afterwards proved, although the will were ſuppreſſed, or its exiſtence were unknown [d], or it were dubious who was executor [e], or he were concealed, or abroad [f], at the time of granting the adminiſtration. Or, if there be two executors, one of whom proves the will, and the other refuſes, and he who proved the will dies, and adminiſtration is granted before the refuſal of the ſurvivor, ſubſequent to the death of his co-executor; or, if granted before the refuſal of the executor, although he afterwards refuſe [g], ſuch adminiſtration ſhall be void. It ſhall alſo be void, if granted on the ground of the executors becoming a bankrupt, as it was before the ſtat. 38 *Geo.* 3. *c* 87. if committed *durante minoritate*, where the infant executor had attained the age of ſeventeen [h]. So, alſo, it ſhall be void if granted by an incompetent authority, as, by a biſhop, where

[d] Com. Dig. Admor. (B. 1. Plowd. 279. 282.

[e] Com. Dig. Admor. (B. 1. Moore 636.

[f] 11 Vin. Abr 68. 2 Lev. 183

[g] Com. Dig. Admor. (B. 2 B. 10.) 2 Lev 182. Vid. 1 Show. 411.

[h] 11 Vin. Abr 99. 5 Co. 29. b

the inteſtate had *bona notabilia* [i], or, by an archbiſhop, of effects in another province [k].

In all theſe inſtances the adminiſtration is a mere nullity. The executor's intereſt the ordinary is incapable of diveſting. But there is another deſcription of caſes, where adminiſtration is not void, but voidable only by the act of the ſpiritual court, as, if adminiſtration be granted to a party not next of kin [l], or to one of kin together with one not of kin, as, to a ſiſter and her huſband [m], or to the wife's next of kin inſtead of the huſband [n]; or, if it be granted on the refuſal of an executor, who had before adminiſtered [o]; or, if it be granted, *non vocatis jure vocandis*, without citing the neceſſary parties [p]; or, to a ſtranger [q]; or, by fraud and miſrepreſentation, though otherwiſe duly granted [r], as where the grantee, by falſe ſuggeſtions, prevented a party in equal degree from applying; or, in caſe adminiſtration be granted in conſequence of the incapacity of the next of kin, and the incapacity be removed [s]; or, if the grantee ſhall become *non compos mentis*, or otherwiſe incapable [t]; or, if it be granted to a creditor before the renunciation of the next of kin [u]; it is not void, but voidable, and may be repealed.

If there be a reſiduary legatee, and adminiſtration be granted to the next of kin, though not void, it may alſo be repealed, whether there be any preſent reſidue, or not [w].

Although

[i] 3 Bac. Abr. 50. Com. Dig. Admor. (B.3) Salk. 36. 1 P. Wms. 44.

[k] Hard. 216.

[l] Com. Dig. Admor. (B.6.) Salk. 38. 1 P. Wms. 43.

[m] Com. Dig. Admor. (B.8.) Al. 36.

[n] 11 Vin. Abr. 85. 1 Sid. 409.

[o] Com. Dig. Admor. (B.8.) Off. Ex. 40. 41.

[p] 11 Vin. Abr. 115. Com. Dig. Admor. (B.8.) 1 Lev. 305.

[q] 11 Vin. Abr. 95. Moore 396.

[r] 11 Vin. Abr. 114. 117. Fitz Gibb. 303.

[s] 11 Vin. Abr. 115. 1 Sid. 373.

[t] 11 Vin. Abr. 115, 116.

[u] Com. Dig. Admor. (B.6.) 1 Salk. 38. 4 Burn Eccl. L. 249. Stra. 911.

[w] Com. Dig. Admor. (B. 8.) 2 Lev. 56. 1 Ventr. 219.

Although a feme covert die entitled to feveral debts due to her before marriage, which by law do not belong to the huſband, and her next of kin appear, and take out adminiſtration, it ſhall be repealed, and adminiſtration granted to the huſband [x].

[x] 11 Vin. Abr. 92. in not. 116, 12 Mod. 438.

If there be two grants of adminiſtration, one by the metropolitan, and the other by the biſhop, where there were not *bona notabilia*, the prerogative adminiſtration may be repealed [y].

[y] 11 Vin. Abr. 114. Cro. Eliz. 283. Com. Dig. Admor. (B. 8.)

At common law the ordinary might repeal an adminiſtration at his pleaſure, but now, ſince the ſtat. 21 *H.* 8. if adminiſtration be regularly granted to the next of kin, according to the proviſions of the ſame, the ordinary has no ſuch diſcretion. If he aſſign a cauſe for a repeal, the temporal courts are to judge of its ſufficiency [z]. Thus, it was held, that, where the ordinary had elected to grant adminiſtration to the father, he had no power of repealing the adminiſtration at the ſuit of a party alleging herſelf to be the widow [a].

[z] 11 Vin. Abr. 114. 4 Burn Eccl. L. 248, 240. Com. Dig. Admor. (B. 8.) 1 P. Wms. 42. ſed. vid. Skinner 156.

[a] Raym. 93. 3 Salk. 22. 11 Vin. Abr. 115. 1 Kebl. 667. 683. 1 Sid. 179.

So where adminiſtration was granted to a ſiſter, a married woman, pending a caveat entered by the brother, on appeal, it was adjudged, that the adminiſtration ſhould not be revoked at his ſuit [b].

[b] 11 Vin. Abr. 115. 1 Lev. 186.

And, where adminiſtration was granted to the younger brother, and the elder ſued to repeal it, the deciſion was the ſame; but, in that caſe, it was

was intimated it would have been different if the administration had been granted pending a caveat[c]. Nor, if administration be granted to a creditor, and, afterwards, a creditor to a larger amount appear, shall it be revoked for him[d]. So, where administration, during the infancy of the intestate's sister, was committed to the great-grandmother, and, though the grandfather, the plaintiff in prohibition, suggested, that the administration was granted by surprize, and, that as he was nearer of kin, it ought to be granted to him; the court thought, in this instance, propinquity to be no ground of preference, and, since the ordinary had no power at common law to grant such administration in the case of an infant next of kin, but only in that of an infant executor, having once executed his authority, the grant ought not to be repealed[e]. So where A., an infant, was made executor, and residuary legatee, and, if he died under age, then B., another infant, was appointed residuary legatee, and, on the like contingency, the residue was bequeathed to C.; administration, during the minority of A., was granted to M. his mother; A. died intestate under age, B. was still an infant, and on the question whether the administration might be repealed, and granted to C. the court seemed to be of opinion, that the ordinary had executed his authority, and that M. should not be divested of the administration during the infancy of B.[f]

[c] 11 Vin. Abr. 116. 2 Kebl. 812. Fitzgibb. 303.

[d] 11 Vin. Abr. 116. 12 Mod. 438.

[e] 11 Vin. Abr. 100. 116. 3 Mod. 23. 25. Skin. 155.

[f] 11 Vin. Abr. 116. 12 Mod. 436. 438.

So

So alſo adminiſtration *de bonis non*, with the will annexed, granted to one, where two had equal right is good, and ſhall not be revoked [g].

[g] 11 Vin. Abr. 116. 2 Jo. 161.

But, in general, if adminiſtration be granted to a wrong party, in ſuch caſe the ordinary may repeal it, and grant it to another, for he has not executed his authority, and it is a power incident to every court to rectify its errors [h].

[h] 11 Vin. Abr. 114. 4 Burn Eccl. L. 248, 249. Com Dig. Admor. (B.8.) 1 P. Wms 42. ſed. vid. Skinner 156.

Therefore, where a feme covert had died inteſtate, and her next of kin had obtained adminiſtration, it was adjudged, that it ſhould be repealed at the ſuit of the huſband, becauſe the ordinary had no power, or election to grant it to any other than to him [i].

[i] 11 Vin. Abr. 116. 4 Burn Eccl. L. 248. 3 Salk. 22.

If the adminiſtration be repealed for want of form in the grant, in ſuch caſe the ordinary muſt re-grant it to the ſame party, although there be others in equal degree [k].

[k] 11 Vin. Abr. 115. 1 Sid. 293.

If adminiſtration be repealed *quia improvidè*, that is, where, on a falſe ſuggeſtion in reſpect to the time of the inteſtate's death, it iſſued before the expiration of a fortnight from that event; or where the court on committing it took ſecurity inadequate to the value of the property, it ſhall be granted to the ſame perſon [l].

[l] 1 Com. Dig. Admor. (B 8.) 1 Sid. 293.

Nor can the ordinary revoke the grant on account of abuſe, although the letters were iſſued after

after a caveat entered, for he ought to take ſufficient caution in the firſt inſtance to prevent maladminiſtration [m]. Nor can he revoke it on the adminiſtrator's omiſſion to bring in an inventory and account [n].

[m] 11 Vin. Abr. 115. Com Dig. Admor. (B. 8.) 1 Ventr. 219.

[n] 11 Vin. Abr. 116. Sty. 102.

If the grant regularly iſſues, and ſubſequent letters of adminiſtration are obtained by colluſion, ſuch ſubſequent letters are void, and ſhall not repeal the former adminiſtration [o].

[o] 11 Vin. Abr. 114. 3 Co. 78 b.

Some authorities maintain, that if the ordinary commit adminiſtration to the wrong party, and then commit it to the right, the ſecond grant is a repeal of the firſt without any ſentence of revocation [p]; but in other caſes it is held, that the firſt is not avoided except by judicial ſentence [q]. And the practice is, to call in and revoke the firſt adminiſtration before the ſecond is granted. But after an adminiſtration by an archbiſhop, if the biſhop to whom it belongs grant adminiſtration, and then the firſt adminiſtration be repealed, the adminiſtration granted by the biſhop before the repeal ſhall ſtand good [r].

[p] 11 Vin. Abr. 114. 4 Burn Eccl. L. 249.

[q] 11 Vin. Abr. 115. in not. Cro. Eliz. 315.

[r] Com. Dig. Admor. (B. 3.) 3 Co. 135 b.

So, in all caſes where the firſt adminiſtration is repealed, the ſecond ſhall be valid, though committed after the grant of the firſt, and before the repeal of it [s].

[s] Com. Dig. Admor. (B. 3.) Vid. 2 Brownl. 119.

If the eccleſiaſtical courts, in the granting or repealing of adminiſtrations, ſhall tranſgreſs the bounds

bounds which the law prescribes to them, a prohibition from the temporal courts shall be awarded, as in the case above-mentioned, where the ordinary has granted a regular administration, and is proceeding to repeal it on insufficient grounds, such as mal-administration [b], or that the letters issued after a caveat entered [c]: but no prohibition to the ecclesiastical courts shall issue on suggestion that they are about to repeal an administration granted by surprize, or that they refused to commit the administration to the intestate's next of kin, but were proceeding to grant it to another, for the point, who is in fact next of kin, is of spiritual cognizance, and must be contested before the spiritual jurisdiction [d].

[b] 1 Ventr. 219. Al. 56.

[c] 1 Lev. 186. Dub. 1 Sid. 371. 1 Lev. 187. et vid. supr. 93.

[d] 1 P. Wms. 43. 2 Bl. Com. 112. 11 Vin. Abr. 92. 115. Com. Dig. Admor. B. 7. 8.

How far the repeal of an administration affects the intermediate acts of the former administrator remains now to be considered.

And here we must again recur to the distinction between such administrations as are void, and such as are only voidable. If the grant be of the former description, the mesne acts of such administrator shall be of no validity; as, if administration be committed on the concealment of a will, and afterwards a will appear; inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void [e]. Or if administration be granted before the refusal of the executor, a sale by the administrator of the testator's effects shall be void, although the

[e] Com. Dig. Admor. B. 10. 2 Lev. 182. 3 Bac. Abr. 50.

executor afterwards appear and renounce [f]. Or, if the executor omit proving the will, whereby administration is granted to a debtor, the executor may afterwards prove it, and then sue the administrator for the debt, which is not extinguished by the administration [g]. So, where an administratrix sued a debtor of the intestate, and, pending the suit, another by fraud procured a second administration to himself jointly with her, and after judgment released to the debtor, on which he brought an *audita querela*, and in the mean time the second administration was revoked, the release was held to be of no avail [h].

[f] 11 Vin. Abr. 95. 2 Mod. 146.

[g] Com. Dig. Admor. B. 10. 1 Leon. 90. 11 Vin. Abr. 94.

[h] Com. Dig. Admor. B. 10. Dyer 339. 6 Co. 9.

Thus in all other cases, the acts of the administrator are of no effect where the administration is unlawful *ab initio*.

If the grant were only voidable, then another distinction arises between the case of a suit by citation, which is to countermand, or revoke, former letters of administration; and on appeal, which is always to reverse a former sentence [i].

[i] 6 Co. 18. b.

In case of an appeal such intermediate acts of the administrator shall be ineffectual, because, as we have before seen, the appeal suspends the former sentence, and on its reversal it is as if it had never existed [k].

[k] 3 Term Rep. 129. 11 Vin. Abr. 117.

But if administration be only voidable, and the suit be by citation, all lawful acts by the first administrator

miniſtrator ſhall be valid, as a *bonâ fide* ſale, or a gift by him of the goods of the inteſtate; and ſuch gift ſhall be available, even if it were with intent to defeat the ſecond adminiſtrator, or were made *pendente lite*, on the citation; although, by the ſtat. 13 *Eliz. c.* 5. it be void as to a creditor [l]. So, if adminiſtration be committed to a creditor, and afterwards repealed on citation at the ſuit of the next of kin, ſuch creditor ſhall retain againſt the rightful adminiſtrator, and his diſpoſal of the goods pending the cauſe, and before ſentence of repeal, ſhall be effectual [m]. If an adminiſtrator aſſign a term, and on a ſubſequent citation to repeal the adminiſtration, it is confirmed, and on appeal the ſentence is reverſed, the aſſignment ſhall be good, for the repeal is merely of a ſentence on citation, and therefore of the nature of a ſuit on ſuch proceſs, conſequently the effect is the ſame as if the firſt adminiſtration had been avoided in ſuch ſuit, and not as if an appeal had been brought in the firſt inſtance [n].

[l] Com. Dig. Admor. B. 9. 1 Salk. 38. 6 Co. 18. b. 11 Vin. Abr. 95.

[m] 1 Salk. 38. 11 Vin. Abr. 117. 1 Ventr. 219.

[n] Raym. 224. 2 Lev. 90. 11 Vin. Abr. 118.

But where an adminiſtrator ſold a term in truſt for himſelf, although the adminiſtration were revoked on a ſuit by citation, and not on an appeal, the aſſignment was decreed to be ſet aſide [o].

[o] 11 Vin. Abr. 95. 2 Chan. Ca. 129.

Whether the adminiſtration be void or voidable, a *bonâ fide* payment to the adminiſtrator of a debt due to the eſtate ſhall be a legal diſcharge to the debtor, by analogy to the caſe before ſtated in regard to ſuch payment under probate of a forged

will [p]. So in a cafe as early as the time of Charles the Second, where the adminiſtrator of the leſſee paid rent to the adminiſtrator of the leſſor, and the latter adminiſtration was repealed, and granted to A. and he brought an action as well for the rent paid to the former adminiſtrator of the leſſor, as for rent which accrued due ſubſequent to the repeal, and obtained a verdict and judgment for the ſame, the defendant was relieved in equity in regard to the rent he had paid, inaſmuch as he had paid it to the viſible adminiſtrator [q].

[p] Allen v. Dundas, 3 Term Rep. 125. Supr. 51.

[q] 11 Vin. Abr. 117. Fin. Rep. 40.

This, however, is to be underſtood only where the grant is revoked on citation; if it be reverſed on appeal, the adminiſtrator's authority was ſuſpended by the appeal, and of courſe ſuch payments ſhall be void.

But whether the adminiſtration be void, or voidable, or be revoked on citation, or appeal, if an action be brought by the adminiſtrator, and, while it is pending, adminiſtration is committed to another, the writ ſhall be abated [r].

[r] 11 Vin Abr. 114. Bro. Admor. pl. 3.

Or, if the adminiſtrator before the repeal obtain a judgment for a debt due to the inteſtate, he is not entitled to take out execution, but the defendant may avoid the judgment by an *audita querela* [s]. So, if the defendant be actually in execution, the judgment ſhall be vacated in the ſame manner, and the execution ſet aſide [t]: for in ſuch caſes the plaintiff had no authority but by virtue of

[s] 11 Vin. Abr. 102. 117. Com. Dig. Admor. B. 10. 2 Sand. 149. 1 Mod. 62. Lutw. 343.

[t] 11 Vin. Abr. 117. Yelv. 125. 3 Bac. Abr. 51.

of a commiſſion from the ordinary, and when that is determined, his authority is determined with it. But on affidavit to ſtay execution on a judgment recovered by an adminiſtrator, on the ground that the letters of adminiſtration were repealed before the judgment entered, it was held that the matter did not come legally in queſtion before the court, and that the party ought to bring an *audita querela* [u].

[u] 11 Vin. Abr. 117. Sty. 417.

If adminiſtration be granted, and afterwards an executor appear, if the adminiſtrator hath paid debts, legacies, or funeral expences, he ſhall be allowed to deduct ſuch payments in the damages recovered againſt him in an action by the executor [w].

[w] 3 Bac. Abr. 50. Plowd. 282.

BOOK II.

OF THE RIGHTS AND INTERESTS OF EXECUTORS AND ADMINISTRATORS.

CHAP. I.

OF THE GENERAL NATURE OF AN EXECUTOR'S OR ADMINISTRATOR'S INTEREST—DISTRIBUTION OF THE SUBJECT WITH REFERENCE TO THE DIFFERENT SPECIES OF THE DECEASED'S PROPERTY.

AN executor, or adminiſtrator repreſents the perſon of the teſtator, or inteſtate, in reſpect to his perſonal eſtate: the whole of which, generally ſpeaking, veſts in the executor immediately on the teſtator's death: in the adminiſtrator on the grant of letters of adminiſtration [a]; and ſuch grant hath relation to the time of the inteſtate's deceaſe [b].

[a] Com. Dig. Admon. B. 10, 11. Co. Litt. 209. 3 Bac. Abr. 57. Off. Ex. Suppl. 47.

[b] Com. Dig. Admon. B. 11. 2 Roll. Abr. 554.

The intereſt which ſuch repreſentative takes in the deceaſed's property is very different from that which belongs to him in regard to his own. Inſtead of being an abſolute intereſt, it is only temporary, and qualified. He is not entitled in his own right, but *in auter droit*, in right of the deceaſed. He is entruſted merely with the cuſtody, and diſtribution of the effects [c].

[c] Off. Ex. 85. 88. Plowd. 525. 11 Vin. Abr. 54. 9 Co. 88. b.

Hence, if an executor be attainted of felony, or treaſon, he incurs a forfeiture of all his own goods and chattels, but thoſe of which he is poſſeſſed as executor ſhall not be forfeited.

If he grant all his property, ſuch as belongs to him in the character of executor ſhall not paſs, unleſs he be ſo named in the grant [c], or unleſs he have no other property [d].

[c] Off. Ex. 86. Vid. 2 Roll. Abr. 58. pl. 8. 1 Leon. 263. Shep. Touch. 94.

[d] Ld. Raym. 1307.

If he become bankrupt, the commiſſioners cannot ſeize the ſpecific effects of the teſtator, not even in money, which ſpecifically can be diſtinguiſhed, and aſcertained to belong to the deceaſed, and not to the bankrupt himſelf [e]. Nor can the teſtator's goods be taken in execution for the executor's debts, either on a recognizance, ſtatute, judgment, or for his debts of whatever nature [f], unleſs there be ſufficient evidence, either direct, or preſumptive, of the executor's having converted the goods to his own uſe [g].

[e] 3 Burr. 1369. 1 Atk. 158.

[f] 11 Vin. Abr. 272. Com. Dig. Admon. B. 10. Off. Ex. 86. R. Farr v Newman, 4 Term Rep. 621. Buller J. contra. See alſo Whale v. Booth. ibid. 625. in not.

[g] Vid. Farr v. Newman, and alſo Quick v. Staines, 1 Boſ. and Pull. 293.

Therefore, where an executor brought an action in the Court of Exchequer, ſuggeſting that the defendant detained from him one hundred pounds, which he owed to him as executor of J. S. whereby he was the leſs able to pay a debt due from himſelf to the crown; the writ was abated, becauſe the court would not intend that the king's debt could be ſatisfied by a judgment recovered by the plaintiff in that capacity [h].

[h] Off. Ex. 87.

Nor

Nor can an executor bequeath the effects which he holds in that right [g]. And if he die without a will, his adminiſtrator ſhall not, as we may remember, intermeddle with the teſtator's eſtate. Nor if an executor die in debt, ſhall the effects of the teſtator be liable in the hands of the executor's repreſentative, to the payment of the executor's debts [h].

[g] 11 Vin. Abr. 421. Plowd. 525. Off. Ex. 86.

[h] Off. Ex. 86.

So, if an executrix marry, all the perſonal chattels of which ſhe is poſſeſſed in her own right, are of courſe abſolutely veſted in the huſband. But in reſpect of the goods of the teſtator, they are not transferred by the marriage [i].

[i] Off. Ex. 87.

Nor if the huſband of an executrix ſue jointly with her for a debt due to her in that character, and ſhe die after judgment, and before execution, can the huſband have execution on the judgment; for although he were privy to the judgment, yet he ſhall not recover the debt, becauſe it belongs to the teſtator's repreſentative [k]. Nor ſhall a term in the hands of the huſband in right of his wife as adminiſtratrix be extendible for his debt [l].

[k] 1 Roll. Abr. 889. tit. Execution.

[l] Cro. Eliz. 291.

But where A. appointed his widow executrix, who continued in poſſeſſion of his goods during three months after his death, and at the end of that time married B.; and, for half a year after the marriage, the goods were treated by them both as the goods of B. it was held, that they might be taken in execution at the ſuit of B.'s creditor [m].

[m] Quick v. Staines, 1 Boſ. & Pull. 293.

Such

Such is the nature of the intereſt to which an executor or adminiſtrator, is entitled in that right, and ſo diſtinguiſhable is it from that which pertains to him in his own.

The perſonal property in which they are thus reſpectively intereſted, that is of a ſaleable nature, and may be converted into ready money, is called aſſets in the hands of the executor or adminiſtrator, that is, ſufficient, from the French *aſſez*, to make him chargeable to a creditor, and legatee, or party in diſtribution, ſo far as ſuch goods and chattels extend [n].

[n] 2 Bl. Com. 510. Off. Ex. Suppl. 53.

The perſonal effects comprehend ſo wide a circle, that in order to view them with any diſtinctneſs, it is neceſſary they ſhould be arranged in a variety of claſſes.

I ſhall therefore firſt conſider them as diſtinguiſhed into chattels real, and chattels perſonal, in the deceaſed's poſſeſſion at the time of his death.

I ſhall then treat of ſuch as were not in his poſſeſſion. And,

Among ſuch as were not in his poſſeſſion, of things in action, as well thoſe where the cauſe of action accrued in his life-time, as thoſe where it accrued after his death.

I ſhall then proceed to the examination of ſuch chattels as veſt in the executor or adminiſtrator,

by condition, by remainder, or increaſe, by aſſignment, by limitation, and by election.

I ſhall next enquire what chattels go to the heir, ſucceſſor, deviſee, or remainder-man.

Then ſhew to what the widow ſhall be entitled.

Then deſcribe the nature of the intereſt of a donee *mortis cauſâ*.

And, laſtly, point out how effects which an executor or adminiſtrator takes in that character may becôme his own.

CHAP. II.

OF THE INTEREST OF AN EXECUTOR OR ADMINISTRATOR IN THE CHATTELS REAL AND PERSONAL.

SECT. I.

Of his intereſt in the chattels real.

FIRST, the perſonal repreſentative is entitled to the chattels real, that is, ſuch as concern or ſavour of the realty, as terms for years of houſes, or land, mortgages, the next preſentation to a church, eſtates

eſtates by ſtatute merchant, ſtatute ſtaple, or elegit, intereſts for years in advowſons, commons, fairs, corodies, eſtovers, profits of leets, and the like. This ſpecies of chattels is ſtyled by the civil law immoveable goods, and, inaſmuch as they are intereſts iſſuing out of, or annexed to real eſtates, in the immobility of which they participate, by our law they are deſcribed as real. And alſo, as the utmoſt period of their exiſtence is fixed and limited, either for ſuch a ſpace of time certain, or till ſuch a particular ſum be raiſed out of ſuch a particular income, and conſequently are diſtinguiſhable from the loweſt eſtate of freehold, the duration of which is neceſſarily indeterminate, they are denominated chattels [a].

[a] 2 Bl. Com. 386. 3 Bac. Abr. 57,58,60, 61. Off. Ex. 53, 54. 11 Vin. Abr. 173. 227. Cro. Jac. 371. Off. Ex. Suppl. 59.

Lands deviſed to an executor for a term of years for payment of debts, are aſſets in his hands [b].

[b] 11 Vin. Abr. 240. 2 Brownl. 47.

Leaſes are likewiſe aſſets to pay debts, although the executor aſſent to the deviſe of them [c]. And in caſe a term be deviſed to the executor, and he enter, and die before probate, the term ſhall be deemed to be legally veſted in him by his entry, and the deviſe executed without the probate [d]. So a leaſe for years determinable on lives is a chattel intereſt, and ſhall veſt in the perſonal repreſentative of ſuch leſſee [e].

[c] 11 Vin. Abr. 233. 1 Chan. Ca. 257.

[d] Dyer 367. a.

[e] Off. Ex. 54.

If an eſtate be granted to A. *pur auter vie*, but not limited to his heirs, and A. die in the life-time of the *ceſtui que vie*, or of him by whoſe life it is holden

holden, as there is no ſpecial occupant, the heir not being named in the grant, it ſhall, by the ſtat. 29 *Car.* 2. *c.* 3. go to the executor, and be aſſets in his hands for payment of debts, and after payment of the ſame, the ſurplus of ſuch eſtate, by the ſtat. 14 *Geo.* 2. *c.* 20. ſhall go in a courſe of diſtribution like a chattel intereſt [f]. Theſe ſtatutes operate equally on grants of eſtates *pur auter vie* in incorporeal hereditaments; as if rent be granted to A. during the life of another, the rent by virtue of theſe proviſions has been holden to continue in the repreſentatives of the grantee dying in the life-time of the *ceſtui que vie* [g].

[f] 2 Bl. Com. 120. 258, 259, 260.

[g] Harg. Co. Litt. 41. b. Fearne's Conting. Rem. 232, 233. 3 P. Wms. 264. in not. Barnardiſt. 46. Vid. alſo ſtat. 5 Geo. 3. c. 17. Sed vid. 2 Bl. Com. 260. Vaugh. 201.

In caſe of a tenancy from year to year as long as both parties pleaſe, if the tenant die inteſtate, the ſame intereſt as the deceaſed had ſhall devolve on his adminiſtrator [h].

[h] Doe on dem. Shore v. Porter, 3 Term Rep. 13. Vid. alſo Gulliver on dem. Taſker v. Burr. 1 Black. Rep. 596. 6 Term Rep. 295.

If the teſtator were leſſee for years, fiſh, rabbits, deer, and pigeons, ſhall belong to his executor as acceſſary chattels, partaking of the nature of their reſpective principals, namely, the pond, the warren, the park, and the dove houſe [i].

[i] Off. Ex. 53. 11 Vin. Abr. 166. Harg. Co. Litt. 8. not. 10.

If an executor hath a leaſe for years of land of the annual value of twenty pounds, rendering a rent of ten pounds a-year, it ſhall be aſſets only for the ten pounds over and above the rent [k].

[k] 3 Bac. Abr. 57. 11 Vin. Abr. 230. pl 42. S.C. 5 Co. 31. Off. Ex. Suppl. 55. Sed vid. Cro. Jac. 545.

A reverſion of a term is veſted in the executor immediately on the teſtator's death, and ſhall be aſſets

assets in his hands for its utmost value [l]. If an executor renew, the new lease as well as the old shall be assets [m]. If A. be possessed of a term as executor, and he purchase the reversion in fee, he is still chargeable for the assets in respect of the term, although it be extinguished, so that it shall be incapable of vesting in his executor [x]. So, if the executor of the lessee surrender the lease, it shall be considered as assets, although the term be extinct [y].

[l] 11 Vin. Abr. 240. 2 Jo. 170.

[m] 3 Bac. Abr. 58. 2 Chan. Ca. 208.

[x] Off. Ex. Suppl. 55. 11 Vin. Abr. 227. pl. 16. 21.

[y] 1 Co. 87. b. 11 Vin. Abr. 229.

So, where A. seised of land in fee devised it to B. for thirty-one years, for payment of debts, and appointed B. his executor, and, during the term, the fee descended on B.; it was adjudged, that, although by the descent of the inheritance, the term was merged as to him, yet that it was in *esse* as to creditors and legatees, and should be assets in his hands [z].

[z] 11 Vin. Abr. 229. Off. Ex. Suppl. 76.

If A. has a term in right of his wife, as executrix, and he purchases the reversion, the term is extinct as to her, though she survive, but, in regard to a stranger, it shall be considered as assets in her hands [a]. But, where A. on his marriage, demised lands to B., and B. re-demised them to A. for a shorter term, subject to a pepper-corn rent, during the life of A., and, after his death, to an annual sum for the life of his wife, as her jointure, and a pepper-corn rent for the remainder of the term, and A. died, it was held, that the re-demised

[a] 11 Vin. Abr. 236. Moore 54.

miſed term ſhould not be aſſets to pay any of his debts, except ſuch as affected the inheritance, inaſmuch as ſuch term was raiſed for a particular purpoſe [b]. So, where A. on the marriage of his ſon B. ſettled a leaſe for years on him for life, and on the wife for life, and then on the iſſue of the marriage, and B. covenanted to renew the leaſe from time to time, and to aſſign it on the ſame truſt, and B. renewed the leaſe in his own name, but made no aſſignment to the truſtees, and died; the leaſe was held to be bound by the agreement on the marriage, and that it was not aſſets, nor liable to his debts [c]. Nor, where a leaſe for years is granted on condition to be void on nonpayment of rent, and the condition is broken, and the leſſee afterwards dies, ſhall it be aſſets in the hands of his executor [d]. Nor is the truſt of a term, made aſſets by the ſtatute of frauds, in the hands of the executor of *ceſtuy que* truſt [e].

[b] 11 Vin. Abr. 236. 2 Vern. 52.

[c] 11 Vin. Abr. 237. 2 Vern. 298.

[d] 11 Vin. Abr. 228. 2 Leon. 143.

[e] Vid. 11 Vin. Abr. 236. 2 Vern. 248.

If the teſtator die in poſſeſſion of a term for years, it ſhall veſt in the executor; and, although it be worth nothing, he cannot waive it, for he muſt renounce the executorſhip in *toto*, or not at all [f]. But this is to be underſtood only where the executor has aſſets, for he may relinquiſh the leaſe, if the property be inſufficient to pay the rent; but in caſe there are aſſets to bear the loſs for ſome years, though not during the whole term, it ſeems the executor is bound to continue tenant, till the fund is exhauſted, when, on giving notice to the leſſor, he may waive the poſſeſſion [g].

[f] Com. Dig. Admon. B. 4. B. 10. 1 Sid. 266. 1 Salk. 297. 1 Lev. 127. 1 Ventr. 271.

[g] Off. Ex. 120. vid. infr.

An

An eſtate, in fee, in the plantations, is ſubject to debts, and eſteemed as a chattel, till the creditors are ſatisfied, when the lands ſhall deſcend to the heir [h]. A leaſehold eſtate in Ireland is conſidered as perſonal eſtate in England; but, whether a leaſehold eſtate in Scotland is to be regarded in the ſame light, ſeems not to be ſettled [i].

[h] 11 Vin. Abr. 233. 237. 2 Ventr. 358. 4 Mod. 226. 4 Burn Eccl. L. 195.

[i] 11 Vin. Abr. 239. 2 P. Wms. 622.

A grant of the next preſentation to a living to J. S. during his life, is limited, and ſhall not carry the preſentation to his executors, on his dying before the church becomes void [k].

[k] 11 Vin. Abr. 436. pl. 27, 28. Cro. Car. 506.

Among chattels real is alſo to be claſſed, the intereſt ſtyled in law, the *annum, diem, et vaſtum*, the year, day, and waſte, that is, where a party, who is not tenant to the king, is attainted of felony, all his lands, and tenements in fee ſimple, are, after his death, forfeited to the crown, for a year and a day; and the king, or his grantee, and therefore his executor, during ſuch period, hath not only a right to take the rents and profits of the eſtate, but alſo to commit upon it whatever waſte he pleaſes [l].

[l] 3 Bac. Abr. 61. Off. Ex. 54. 2 Bl. Com. 252. 4 Bl. Com. 285. 11 Vin. Abr. 175.

If rent be reſerved on a leaſe for years, and the leſſor die, the rent in arrear, at the time of his death, ſhall go to his executor [m].

[m] Off. Ex. 53. Off. Ex. Suppl. 119 3 Bac. Abr. 63.

A leſſee for years hath only a ſpecial intereſt, and property in the fruit, and ſhade of timber trees, ſo long as they are annexed to the land, but he has a general property in hedges, buſhes, and trees, not

not timber [n], and, consequently, the same interest shall vest in his executor. If he be lessee, without impeachment of waste, in that case, he has a general property, as well in timber trees as others; but, unless they are severed during the term, they shall not belong to him, or to his executor, but to the lessor, as annexed to the freehold.

[n] Com. Dig. Biens. H. 4 Co. 62. b. Dy. 90. b. 1 Roll. Rep. 181.

Where such chattels concern corporeal hereditaments, as leases for years of houses or lands, the executor is not deemed to be in possession of them, till he has actually entered. But, in regard to such chattels as relate to incorporeal hereditaments, as leases of tithes, the possession of the executor is necessarily constructive, because on them there can be no entry. At the instant, therefore, that the tithes are set out, in a place however remote, he shall be possessed of them in contemplation of law [o].

[o] Off. Ex. 108, 109. 11 Vin. Abr. 240.

If the lease be of a rectory, consisting not only of tithes, but also of glebe lands, then, it appears, that the executor is not in possession of the tithes, unless he enter upon the lands [p].

[p] Off. Ex. 109.

The executor of tenant, from year to year, of an estate under the annual value of ten pounds, may gain a settlement by residing on it for forty days [q].

[q] The King v. the Inhabitants of Stone, 6 Term Rep. 295.

SECT. II.

Of his interest in the chattels personal, animate, vegetable, and inanimate.

SECONDLY. Chattels personal are such things as are annexed to, or attendant on, the person of the owner; and these, by the civil law, are denominated moveable. They are, also, to be distinguished into animate, vegetable, and inanimate [a].

[a] 2 Bl. Com. 387. 389. Off. Ex. 55, 56, 57.

The animate are also divided into such as are *domitæ*, and such as are *feræ naturæ*, some being of a tame, and others of a wild disposition. Those of a nature tame and domestic, as sheep, horses, kine, bullocks, poultry, and the like, are capable of an absolute property, and are transmissible like all other personal chattels, to an executor. Those of a wild nature, as deer, hares, rabbits, pigeons, pheasants, partridges, and hawks, admit only of a qualified ownership. Therefore, unless they are reclaimed, that is, rendered tame by art, industry, and education, or confined so that they cannot escape, and enjoy their natural liberty, or, unless they are incapable, through weakness, of flying, or running away, they are *nullius in bonis*, not regarded in the light of private property, and consequently cannot pass to representatives [b]. But the animals, I have just enumerated, provided they are tame, shall belong to the executor. He shall, also,

[b] 2 Bl. Com. 390, 391. Com. Dig. Biens. A. 2.

alſo, be entitled to them, although not tame, if they be taken, and kept alive in any room, cage, or other receptacle [c]. Nor can an abſolute property exiſt in fiſh, at large in the water; but, fiſh in a trunk, ſhall go to the executor [d]. Alſo, hawks, herons, and other birds, rabbits and other creatures, in neſts, or burrows, if too young to fly, or run away, are all to be claſſed among perſonal chattels [e].

[c] Off. Ex. 53. 57.

[d] Off. Ex. 53. 2 Bl.Com. 392.

[e] Off. Ex. 57. 2 Bl.Com. 394.

Of the ſame deſcription are hounds, greyhounds, and ſpaniels, and, as acceſſary to ſuch chattels, a hunter's horn, and a falconer's lure [f]. And, ſince the executor's intereſt is co-extenſive with that which was veſted in the teſtator, the property in all his animals, however minute, in point of value, ſhall go to the executor, as houſe-dogs, ferrets, and the like [g]; or although they were kept only for pleaſure, curioſity, or whim, as lap-dogs, ſquirrels, parrots, and finging-birds [h].

[f] Off. Ex. 53. 57.

[g] 3 Bac. Abr. 57. Off. Ex. 58.

[h] 2 Bl. Com. 393.

An executor ſhall, likewiſe, be entitled to deer in a park, hares, or rabbits, in an encloſed warren, doves in a dove-houſe, pheaſants, or partridges, in a mew, fiſh in a private pond, and, according to Bracton, to bees in a hive; if, as we have before ſeen, the teſtator were leſſee for years of the premiſes, to which they reſpectively belong [i]

Supr. 107.

[i] 2 Bl. Com. 393. Off. Ex. 53. Hargr. Co. Litt. 8. not. 10.

Theſe various animals are no longer the property of an individual, or tranſmiſſible to his repreſentative, than while they continue in his poſſeſſion. If they obtain their natural freedom, his property inſtantly ceaſes, unleſs they have *animum revertendi*, which is to be known only by their cuſtom of returning. The law, therefore, extends this poſſeſſion farther than the mere manual occupation. The qualified property in a tame hawk is not diveſted by his purſuing his quarry in the preſence of the ſportſman, nor in pigeons, eſpecially of the carrier kind, by their flying at a diſtance from their home; nor in deer, by their being chaſed out of a park, or foreſt; nor in bees, by their flying from the hive, if they are immediately purſued by the keeper, foreſter, or owner. If they ſtray or fly without the knowledge of the owner, and return not in the uſual manner, they are free, and open to the firſt occupant. But, if a deer, or any wild animal reclaimed, hath a collar, or other mark put upon him, and goes and returns, at his pleaſure, the owner's property in him ſtill continues; but, if the deer has been long abſent, without returning, ſuch property ſhall ceaſe [k].

[k] 2 Bl. Com. 392. Com. Dig. Biens. F. 7 Co. 17. b.

Perſonal effects, of a vegetable nature, are the fruit, or other parts of a plant, or tree, when ſevered from the body of it, or, the whole plant, or tree itſelf when ſevered from the ground; as apples or pears, which are gathered or fallen, graſs which is cut, and trees, or their branches, which are felled or lopped [l].

[l] 2 Bl. Com. 389. Off. Ex. 59.

There

There are, alſo, various vegetables, ſtyled in law emblements, which are deemed perſonal, and go to the executor, although they are affixed to the ſoil. They are ſo claſſed when they are raiſed annually by labour and manurance, which are conſiderations of a perſonal nature. The appellation of emblements, properly ſpeaking, ſignifies the profits of ſown land, but, in a larger ſenſe, it extends to roots planted, or other annual artificial profit; it includes corn growing, hops, ſaffron, hemp, flax, and, as it ſeems, clover, ſaint-foin, and every other yearly production in which art, and induſtry muſt combine with nature [m].

[m] 2 Bl. Com. 122, 123; Termes de la ley Embl. Off. Ex. 59. 4 Burn Eccl. L. 255. Com. Dig. Biens. G. 1. Hargr. Co. Litt. 55. b.

On the ſame principle melons, cucumbers, artichokes, parſnips, carrots, turnips, and the like, belong to the executor [n]. The executor of tenant for life has alſo been held entitled to hops, although growing on ancient roots, as in the nature of emblements in reſpect of the cultivation, which is neceſſary to produce them [o]. Manure, in a heap, before it is ſpread on the land, is alſo a perſonal chattel [p].

[n] 4 Burn Eccl. L. 254. 2 Bl. Com. 123. Roll. Abr. 728.

[o] Hargr. Co. Litt. 55. b. not. 1. Cro. Car. 515.

[p] 11 Vin. Abr. 175. Sty. 66.

Perſonal chattels inanimate are houſehold goods, merchandize, money, pictures, jewels, garments, in ſhort, every thing not included in the former claſſes, that can be properly put in motion, and transferred from one place to another [q].

[q] 2 Bl. Com. 387. 389. Off. Ex. 57.

There are, alſo, ſome other intereſts, which fall under the deſcription of perſonal chattels. Of this ſpecies is the teſtator's property in the public funds.

The next advowſon, before it becomes void, as I have already ſtated, is a chattel real, but, after an avoidance, it is a chattel perſonal [r].

[r] 11 Vin. Abr. 173. Off. Ex. 54. 73.

The executor alſo has an intereſt in the perſon of a debtor, in execution at the teſtator's ſuit, and, without the executor's aſſent, the party cannot be diſcharged. This intereſt is in the nature of a perſonal chattel, inaſmuch as the debtor is merely a pledge to ſecure the debt [s]. So, a priſoner taken in war is of the ſame ſpecies in reſpect of his ranſom, and, on the captor's death, ſhall go to his executor [t]. Such, alſo, ſeems the intereſt in negro ſervants, purchaſed when captives of the nations with whom they are at war; though, accurately ſpeaking, this property of the purchaſer, (if it indeed continue,) conſiſts rather in their perpetual ſervice, than in their bodies, or perſons; but, ſuch as it is, it veſts equally in the executor [u].

[s] 3 Bac. Abr. 57. Off. Ex. 56.

[t] Off. Ex. 56.

[u] 2 Bl. Com. 401. Carth. 396. Ld. Raym. 147. Salk. 667.

An executor has no intereſt in an apprentice bound to the teſtator. The contract is in its nature merely perſonal, and dies with the maſter. Yet, although an apprentice be not ſtrictly tranſmiſſible, if, with the conſent of all parties, and his own, he continue with the executor, it is a continuation of the apprenticeſhip [w]; provided, in the caſe of a trade, it be of the ſame ſpecies [x].

[w] Stra. 1115. 1266. Dougl. 70. ſed vid. Off. Ex. 53.

[x] Vid. ſtat. 5 Eliz. c. 4. 1 Bl. Com. 427, 428.

An intereſt in the teſtator's literary property may devolve on the executor, purſuant to ſeveral ſtatutes [y]. An intereſt may, likewiſe, veſt in him by

[y] Stat. 8 Ann. c. 19. 15 Geo 3. c. 53. 8 Geo. 2. c. 13. 7 Geo. 3. c. 38. 17 Geo. 3. c. 57.

by virtue of a patent granted to his teſtator, for the invention of a new manufacture within the realm [y].

[y] Stat. 21 Jac. 1. c. 3.

It ſeems, alſo, that a caroome, or a licence by the mayor of London to keep a cart, is a chattel intereſt, and belongs to the executor [z].

[z] 11 Vin. Abr. 151. Com. Dig. Biens. B. 2 Vern. 83.

The intereſt in all theſe chattels is, at the inſtant of the teſtator's death, veſted in the executor, and from the death of the inteſtate, by relation, in the adminiſtrator, whether he has reduced them into his actual poſſeſſion, or not, and, however widely diſperſed, or remotely ſituated, they are regarded, in law, as aſſets in his hands [a]. Therefore, where the jury found aſſets in Ireland, the ſtating of them on the ſpecial verdict to be in Ireland, was holden ſurpluſage [b]. So, if an executor live in London, and have left goods in Briſtol, he hath ſuch an immediate poſſeſſion of the goods, that he may maintain trover for them in his own name [c]. In like manner he ſhall be deemed to be in poſſeſſion of a ſhip at ſea. In ſhort, in whatever part of the world the teſtator hath left effects, the executor, whether in the manual occupation of them, or not, is deemed, to all intents, and purpoſes, their poſſeſſor in point of law [d]. And, even, if goods be, in fact, taken out of his poſſeſſion, after he has adminiſtered, legally he is not diveſted of them; they are ſtill eſteemed aſſets in his hands [e].

[a] Off. Ex. 108, 109. 3 Bac. Abr. 57. Roll. Abr. 921.

[b] 6 Co. 46. b. 11 Vin. Abr. 230.

[c] 3 Bac. Abr. 58. in not. 6 Mod. 181. R. in evidence by Holt C.J. Bollard et Ux admx. v. Spencer, 7 Term Rep. 358. 4 Term Rep. 563. ſed vid. Cockerill et Ux. extx. v. Kynaſton, 4 Term Rep. 277.

[d] 3 Bac. Abr. 57. 11 Vin. Abr. 230. 240.

[e] Off. Ex. 113. Off. Ex. Suppl. 56. 5 Co. 33. b. 11 Vin. Abr. 230.

But, to give the executor a title, or to constitute assets, the absolute property of such chattels must have been vested in the testator, and, therefore, if A. take a bond in trust for B. and die, it shall form no part of the assets of A. [f]. So, if the obligee assign a bond, and covenant not to revoke the assignment, the bond shall not be included among his assets [g].

[f] 3 Bac. Abr. 58. Salk. 79.

[g] 3 Bac. Abr. 58. Salk 79.

Nor shall goods, bailed or delivered for a particular purpose, as, to a carrier to convey to London, or to an inn-keeper to secure in his inn, be assets in the hands of their respective executors. Nor shall goods pledged or pawned in the hands of the executor of the pawnee, nor goods distrained for rent, or other lawful cause, be considered as the assets of the party distraining. Nor, if the testator were outlawed at the time of his death, shall his effects be so considered [h].

[h] 2 Bl. Com. 395, 396. 3 Bac. Abr. 58.

If A. consent to a disposition of the goods of the intestate, and afterwards take out administration, he shall be bound by the antecedent gift [i]; but, if the executor make a fraudulent gift of them, they shall continue assets [k].

[i] Com. Dig. Admon. B. 10. Per two Just. Holt, C. J. contr. 1 Salk. 295. S. C. 3 Salk. 161. S.C. Carth. 103. S.C. Skin 274. S. C. 3 Mod. 276.

[k] 3 Bac. Abr. 58. Cro. Eliz. 405.

Such deeds and writings as relate to terms for years, or other chattels, belong to the executor [l].

[l] 3 Bac. Abr. 65. Off. Ex. 63.

Also, the property in the coffin, shroud, and other apparel of the dead body, remains in the executor [m].

[m] 2 Bl. Com. 429.

Chattels

Chattels perſonal, in the hands of an executor, may, in certain caſes, be changed into chattels real, and ſo *vice verſâ*; as, if a debt be due to J. S. as executor, on ſtatute, recognizance, or judgment, and he ſue out execution, and take the lands of the debtor in extent, the perſonal duty is, in that caſe, converted into a chattel real: On the other hand, if ſuch eſtate by extent, or a mortgaged term, devolve on an executor, and the debtor, or mortgagor pay the money due, ſuch chattels real are turned into chattels perſonal[n].

[n] Off. Ex. 75. 3 Bl. Com. 420.

CHAP.

CHAP. III.

OF THE INTEREST OF THE EXECUTOR OR ADMINISTRATOR, IN SUCH OF THE CHATTELS AS WERE NOT IN THE DECEASED'S POSSESSION AT THE TIME OF HIS DEATH.

SECT. I.

Of his intereſt in choſes *in action.*

I PROCEED now to treat of ſuch of the teſtator's effects as were not in his poſſeſſion at the time of his death; and in this claſs I am firſt to conſider *choſes*, or things in action, as well thoſe where the cauſe of action accrued in the teſtator's life-time, as thoſe where it accrued after his death.

In regard to the firſt, the executor is entitled to the teſtator's debts of every deſcription, either debts of record, as judgments, ſtatutes, and recognizances; or debts due on ſpecial contracts, as for rent; or on bonds, covenants, and the like, under ſeal; or debts on ſimple contracts, as notes unſealed, and promiſes not in writing, either expreſs or implied; and all ſuch debts, when received by the executor, ſhall be aſſets in his hands [a].

[a] Off. Ex. 65. 3 Bac. Abr. 59. Com. Dig. Admon. B. 13.

An executor is alſo entitled, purſuant to ſtat. 4 *Ed.* 3. *c.* 7. to a compenſation in damages for a treſpaſs

treſpaſs committed on the teſtator's goods in his life-time; and by the equity of that ſtatute, for a converſion of the ſame, or for treſpaſs with cattle in his cloſe [a]; or for cutting his growing corn, which is a chattel, and carrying it away at the ſame time [b]; and by the ſame liberal conſtruction of the abovementioned ſtatute, the executor is alſo entitled to a debt accrued to the teſtator, under the ſtat. of 2 & 3 *Ed.* 6. *c.* 13. for not ſetting out tithes [c]; to a *quare impedit*, for a diſturbance of his patronage [d]; to ejectment, for ejecting him [e]; and, in ſhort, to every other injury done to his perſonal eſtate previouſly to his death.

[a] 3 Bac. Abr. 59. Com. Dig. Admon. B. 13. Off. Ex. 70. Lat. 168.

[b] 1 Ventr. 187.

[c] 1 Sid. 88. 407. 1 Ventr. 30. Poph. 189.

[d] Off. Ex. 66, 67.

[e] Poph. 189.

An executor ſhall alſo have damages for the breach of a covenant to do a perſonal thing [f]; and although the covenant found in the realty, as for not aſſuring lands, yet if it be broken in the teſtator's life-time, the executor ſhall be entitled to damages [g]; and the damages in any of theſe caſes, when recovered, ſhall be regarded as aſſets.

[f] Lat. 168. 3 Bac. Abr. 59.

[g] Com. Dig. Admon. B. 13. Com. Dig. Covenant. B. 1. 1 Ventr. 176. 347. 2 Lev. 26. Off. Ex. 65.

So the executor of the aſſignee of a bail-bond ſhall recover on that inſtrument, inaſmuch as it is a veſted intereſt [h].

[h] Com. Dig. Admon. B. 13. Fortef. 367.

So an executor is entitled to damages againſt a ſheriff for permitting a party in execution on a judgment recovered by the teſtator to eſcape; even although the eſcape happened in the teſtator's life-time [i]. An executor may alſo demand damages of a ſheriff for not returning his writ, and paying money

[i] Com Dig. Admon. B. 13. Cro. Car. 297. Mod. Ca. 126.

money levied on a *fieri facias* [k]; or for a false return, stating that he had not levied the whole debt, when in fact he had [l]. So, if the testator in his life-time were entitled to a writ of error, or *audita querela*, or to the antiquated remedies of attaint, *deceit*, or *identitate nominis*, the executor has a right to recover such compensation as the testator might have claimed; and whatever he so recovers, shall be assets in his hands [m]. So, an executor is entitled to replevy goods of the testator [n]; or to recover damages of an officer for removing goods taken in execution before the testator, who was the landlord, had been paid a year's rent [o]. And, in general, an executor has a right to a compensation, whenever the testator's personal estate has been damnified, and the wrong remains unredressed at the time of his death.

[k] Com. Dig. Admon. B. 13. Cro. Car. 297.

[l] 2 Salk. 12.

[m] 3 Bac. Abr. 60. Off. Ex. 71.

[n] 1 Sid. 82. Off. Ex. 66.

[o] Com. Dig. Admon. B. 13. Stra. 212.

But an executor has no right to an action for an injury done to the person of the testator [p], nor for a prejudice to his freehold; as for felling trees, or cutting the grass, for the trees, and grass are parcel of the same [q].

[p] Lat. 168, 169. 1 And. 243. Jon. 174.

[q] 1 Ventr. 187. Off. Ex. 68.

An executor shall also have the benefit of any equitable title of the testator in respect to personal property; and money recovered by the executor by decree in a court of equity, shall be assets [r].

[r] 3 Bac. Abr 59. Moore 858. 2 Chan. Ca. 152. Brownl. 76.

In all the above-mentioned cases, I suppose the cause of action to have accrued before the death of the testator. But where it accrues after that event, the

the executor is equally entitled to the debt, or damages.

Therefore, if A. contract to deliver certain goods to B. on a certain day, and they are not delivered in the life-time of B. but after his death to his executor, he shall be possessed of them in that character, and they shall be assets in his hands; as in case the contract had not been performed, damages recovered for the non-performance would have been so considered [s]. So if A. covenant with B. to grant him a lease of certain land by a certain day, and B. die before the day, and before the grant of the lease, A. is bound to grant it to the executor of B. and it shall be vested in him as executor, and consequently be assets [t]. Or, if A. refuse to grant the lease, he is liable to make a compensation to the executor of B. in damages, which shall also be assets [u].

[s] Off. Ex. 82.

[t] Off. Ex. 82. 11 Vin. Abr. 231. L. of. Ni. Pr. 158.

[u] Plowd. 286.

So also a bail-bond may be assigned to a deceased plaintiff's executor, and he shall be equally entitled to recover upon it, as if it had been assigned to the testator in his life-time [w].

[w] Forteſ. 370.

So, if a defendant in execution at the testator's suit escape after the testator's death, the executor shall recover damages for the escape, and the damages so recovered shall be assets [x]. So an executor is entitled to replevy goods taken after the death of the testator [y]. So, if A. die possessed of a term for years in an advowson, such term shall vest

[x] Com. Dig. Admon. B. 13. Godb. 262. Vid. 1 Roll. Rep. 276.

[y] Off. Ex. 36.

veſt in his executors; and in caſe of their being diſturbed, they ſhall recover damages in a *quare impedit*, and ſuch damages ſhall be aſſets [z].

[z] Off. Ex. 36.

So, if an executor has an equitable title to property in that character, and he inſtitutes a ſuit for the ſame, and it be decreed to him in a court of equity, it ſhall alſo be aſſets [a].

[a] Com. Dig. Aſſets C. Roll. Abr. 920. Moore 858.

Where the cauſe of action accrued before the teſtator's death, neither debts nor damages ſhall be aſſets, till they are actually recovered by judgment, and levied by execution, or otherwiſe reduced into poſſeſſion [b].

[b] 11 Vin. Abr. 239, 240. 3 Bac. Abr. 60. 1 Salk. 207.

So, the balance of an account ſtated with the executor ſubſequent to the teſtator's death ſhall not be aſſets, unleſs he has recovered the ſame, and has it actually in his hands, for the promiſe to the executor, on the account ſtated, creates no new cauſe of action, but aſcertains merely the old cauſe of action which exiſted in the teſtator's life-time [c]. But ſuch debts or damages recovered may be aſſets, although never, in point of fact, received, as, if they be releaſed by the executor. For the releaſe, in contemplation of law, ſhall amount to a receipt [d].

[c] 11 Vin. Abr. 240. 1 Salk. 207.

[d] 3 Bac. Abr. 60. Hob. 66. Cro. Eliz. 43.

Where the cauſe of action accrues after the teſtator's death, the debt or damages ſhall be aſſets immediately. As where money was had and received by the defendant, to the uſe of the plaintiff as

as executor, it was held, that if the defendant received the money by the consent or appointment of the plaintiff, it was assets in his hands immediately; if without his consent, yet the bringing of the action was such a consent, as that on judgment obtained it should be assets immediately without execution [c].

[c] 1 Salk. 207.

If a covenant affect the realty, and the breach be subsequent to the testator's death, the heir, and not the executor, as is hereafter shewn, shall be entitled to the damages.

SECT. II.

Of interests vested in him by condition, by remainder, or increase, by assignment, by limitation, and by election.

AN executor may become entitled in such character to chattels real or personal, by condition. As, if a lease for years, or other chattel, has been granted by the testator to A. on condition, that if A. do not pay a certain sum of money, or perform some other specific act within a limited time, the grant shall be void, and the condition is not performed, such chattel shall result to the executor, and be assets [a]. So, where the condition is, that the testator or his executors shall pay a sum of money

[a] Off. Ex. 76.

money to avoid the grant, and the executor ſhall pay it accordingly. As if A. mortgage a leaſe, or pledge a jewel, or piece of plate, and before the day limited for redemption or payment die, his executor is entitled to redeem at the day and place appointed [b]. If he redeem with the teſtator's money, ſuch chattels ſhall be aſſets [c]. If he redeem with his own money, he ſhall be indemnified in reſpect to the ſum he has diſburſed out of the effects of the teſtator, or, if neceſſary, by the ſale of the chattel itſelf; and in that caſe, the ſurplus over and above ſuch indemnity ſhall be aſſets [d]. In caſe he have no fund as executor, and he advance the money out of his own purſe for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by ſuch payment, and ſhall be veſted in the executor as a purchaſer in his own right [e]. But if the executor diſburſed his own money to redeem, after the time ſpecified for redemption is elapſed, then it is ſaid that the chattel, without any diſtinction in reſpect of its value, ſhall at law belong to the executor in his own right; ſince in ſuch caſe it muſt be deemed to be ſold to him by the mortgagee, or pawnee, who, after the forfeiture is incurred, has a legal right to diſpoſe of it at his pleaſure to him, or to any other perſon. But in equity, the exceſs in the value of the thing beyond the money paid for the redemption ſhall be regarded as aſſets in the hands of the executor [f].

[b] Off. Ex. 76, 77.

[c] Off. Ex. 81.

[d] 3 Bac. Abr. 58, 59. in not. Off. Ex. 79. 2 Fonbl. 404. n. f.

[e] 1 Bac. Abr. 58. Keilw. 63.

[f] Off. Ex. 81.

Chattels which were never veſted in the teſtator in poſſeſſion, may accrue to an executor by remainder

mainder, or increaſe. As, if a leaſe be granted to A. for life, remainder to his executors for years, ſuch remainder ſhall be aſſets in the hands of his executor, though it could never come into the poſſeſſion of the teſtator. In like manner, where a leaſe for years is given by will to A. for life, and on his death to B., and B. dies before A., although the term were never in B. yet it ſhall devolve on his executor, and be aſſets. So, a remainder in a term for years, though it never veſted in the teſtator's poſſeſſion, and though it continue a remainder, ſhall go to the executor, and ſhall be aſſets, for it bears a preſent value, and is capable of being ſold [g].

[g] Off. Ex. 83. Vid. 2 Fonbl. 371. not. (k).

But where a leaſe was granted to A. for life, with a proviſo, that if he died before the end of ſixty years then next enſuing, that his executor ſhould hold the premiſes as in his right for the term of ſo many years as ſhould amount to the whole number of ſixty, ſo that the commencement of the ſame ſhould be computed from the date of the indenture: It was held, that a leaſe for years was not created by this proviſo, either in A. or by remainder in his executor [h].

[h] 11 Vin. Abr. 157. Anderſon 19. pl. 38. Sed vid. Off. Ex. 83.

So, the young of cattle, or the wool of ſheep, produced after the teſtator's death, ſhall be aſſets [i]. So, if an executor of a leſſee for years enter on the lands demiſed, the profits over and above the rent ſhall be ſo regarded [k].

[i] Off. Ex. 83.

[k] Com. Dig. Aſſets C. 1 Salk. 79. Vid. Off. Ex. 84. 85.

A trade is not tranſmiſſible to an executor, it is terminated by the death of the trader. If, therefore, executors carry on trade, they muſt do ſo at their own riſque as individuals: but they may carry it on in their repreſentative capacity under the direction of the court of chancery [l].

[l] 1 Term. Rep. 295. Sed Vid. Off. Ex. 83.

An executor may alſo take under the deſcription of an aſſignee.

Aſſignees are ſuch perſons as the party, who has a power of aſſignment, actually aſſigns to receive the chattel; as if A. contract to deliver a horſe on a given day to B. or his aſſigns, then if B. appoint J. S. to receive the horſe, J. S. is an aſſignee in deed [m].

[m] Plowd. 288.

But an executor is an aſſignee in law, becauſe by law he is the repreſentative of the teſtator, and is entitled to all his goods and chattels, and the benefit of all perſonal contracts entered into with him; and therefore in the caſe juſt mentioned, if B. die before the day limited for the delivery of the horſe, it ought to be delivered to his executor; for by law he is the aſſignee of B. for ſuch a purpoſe [n].

[n] Plowd. 288.

So, if a legacy is bequeathed to A. and his aſſigns, and A. die before payment, it ſhall go to his executor or adminiſtrator, as aſſignee [o]. So, if A. be bound to deliver a true rental to J. S. or his aſſignee at the end of twenty years, and he die before that time has elapſed, A. is bound to deliver a

[o] 11 Vin. Abr. 156.

true rental to his executor, for he is assignee in point of law [p]. So, if A. be bound to abide by the award of two arbitrators, and they award that he shall pay to B. or his assigns, two hundred pounds before a day limited for that purpose, and B. die before the day, the money shall be paid to his executor as assignee [q]. Or if A. covenant to grant a lease to J. S. and his assigns, by Christmas, and J. S. die before that time, and before the grant of the lease, it must be made to his executors as his assigns [r]. So, if a lessor covenant to build a new house for the lessee and his assigns, the executor of the lessee shall have the benefit of the covenant as assignee [s]. But where a bond was conditioned for the obligor's paying twenty pounds to such person as the obligee should by his will appoint, and he nominated J. S. his executor, but made no other appointment, it was resolved that the executor should not have the twenty pounds, for he is only an assignee in law, and takes to the use of the testator, but that in that case the condition was in favour of an actual assignee who takes to his own use [t].

[p] 11 Vin. Abr. 156. Hob. 10.

[q] 11 Vin. Abr. 157. 1 Leon. 316.

[r] 11 Vin. Abr. 158. Off. Ex. 101.

[s] 11 Vin. Abr. 158. Lat. 261.

[t] 11 Vin. Abr. 156. Hob. 9. Godb. 192. Harg. Co. Litt. 210. not. 1.

So, it has been held, that if A. be bound to pay ten pounds to the assignee of B. the obligee, B.'s executor shall not have the ten pounds. But that if A. be bound to pay ten pounds to B. or his assignee, then the executor of B. shall be entitled, because it was a right vested in the obligee himself [u].

[u] 11 Vin Abr. 161. Godb. 192.

So, before the provisions of the statute of frauds in regard to estates *pur auter vie* [u], if a lease were granted to A. and his assigns during the life of B. it could go only to A.'s assignee in deed, and not to his executors [w]. And, on his failure to appoint such assignee, it was, in case of his death, open to be appropriated by the first occupant that could enter upon it during the life of *cestui que vie*.

[u] Vid. supr. 106.

[w] 11 Vin. Abr. 158. Off. Ex. 201.

But where on a fine the use of land was limited to A. for eighty years, with a power to A. and his assigns to make leases for three lives, to commence after the expiration of the term: A. assigned over to B; B. died, having made his will and appointed C. his executor: C. assigned over to D.; and D. in pursuance of the power, made a lease for life: The question was, whether D. was such an assignee of A. as to have a power to make this lease, or whether it should extend only to the immediate assignees of A.; a point the more doubtful, as there had been a descent on an executor. On its being objected, that an executor should not in some cases be said to be a special assignee, the court seemed inclined to the contrary; and that D. should be considered as an assignee for the purpose of making the leases in question, as well as any person that should come to the estate under the first lessee, though there should be twenty mesne assignments; and on a subsequent day judgment was given accordingly [x].

[x] Harg. Co. Litt 210. not 1. 1 Freem. 476. 11 Vin. Abr. 158.

An executor may also be entitled in respect of limitation; as, where the testator devised the beneficial

ficial intereſt of a leaſe for twenty-one years to B. his wife, and executrix, for ſix years, with a proviſo, that if C. his ſon, who was then abroad, ſhould come home within that period of time, he ſhould have the reſidue of the term, but that if he ſhould fail to do ſo, then that D. another of his ſons, ſhould have it until the arrival of C. B. the wife entered, D. died within the ſix years, at the expiration of which C. was not returned. It was held, that this was not a mere poſſibility indeed, but was coupled with an intereſt in the term after the ſix years elapſed, and was therefore tranſmiſſible to D.'s executor [y]. So, it is held by ſome authorities, that where a term is deviſed to A. and the heirs male of his body, and if he die without iſſue male to J. S. and J. S. die in the life-time of the firſt deviſee, yet that his poſſibility of having the term under ſuch deviſe ſhall belong to his executor [z]. But by other authorities it has been adjudged, that the executor of J. S. cannot enter, becauſe he had only a poſſibility and no intereſt, and that this caſe is diſtinguiſhable from that above ſtated, inaſmuch as in this caſe the whole term was veſted in the firſt deviſee, whereas in that caſe only a part of it was ſo veſted [a].

[y] 11 Vin. Abr. 159. Cro. Jac. 509.

[z] 11 Vin. Abr. 159. Off. Ex. 241.

[a] 11 Vin. Abr. 159. in not. Moore 831. 4 Leon. 246.

If a legacy out of the perſonal eſtate is bequeathed to A. to be paid *when* he is of the age of twenty-one years, and he dies before that time, his executors are entitled to the legacy; immediately, if it be payable with intereſt; if not, when A. would have come of age [b]. But if ſuch legacy

[b] 11 Vin. Abr. 160. Carth. 52. Com. Dig. Chan 3. Y 8. Chan. R. 112. 2 Ventr. 342. 366. 2 Vern. 199.

gacy be bequeathed to A. *at* his age of twenty-one merely, or *if* he ſhall attain the age of twenty-one, and he die before that period, his executors have no title [c].

This diſtinction with reſpect to intereſts ariſing out of perſonal property, as far at leaſt as they are of a *legatory* nature, although it be explained, and in ſome degree corrected by the more modern caſes, is in ſubſtance eſtabliſhed by a ſeries of authorities [d]; but although the legacy out of the perſonal property be left to A. *at* twenty-one, yet if intereſt is given before the time of payment, that circumſtance is held to be evidence of an intention to veſt the legacy [e]. But ſuch preſumption does not appear to be formed from that circumſtance in reſpect to any intereſts but thoſe of a legatory nature, although the fund be merely perſonal: for it hath not been admitted in caſes of portions for younger children, to be raiſed out of ſuch fund at twenty-one, with intereſt in the mean time for maintenance and education [f].

So with reſpect to all intereſts ariſing out of land, the rules on the ſubject are totally different; for whether the land be the primary, or auxiliary fund, whether the charge be made by deed, or will, as a portion, or a general legacy for a child or a ſtranger, with or without intereſt, the general rule is, that charges on land, payable on a future day, ſhall not be raiſed where the party dies before the day of payment [g]. This rule however is ſubject to many

[c] Com. Dig. Chancery 3. Y 8. 2 Ventr. 342. Com. Rep. 2d Ed. 719.
[d] 2 P. Wms. 612. Mr. Cox's not. 1. 2 Chan. Ca. 155. 2 Salk. 415. 1 Eq. Ca. Abr. 295. 1 Vern. 255. Prec. Chan. 318. 3 Bro. P. C. 337. 2 Eq. Ca. Abr. 548. Barnard. 320. 3 Atk. 427. 1 Burr. 227. 1 Bro. Ch. Rep. 281. 298. 2 Bro. Ch. Rep. 75. 3 Bro. Ch. Rep. 471.
[e] 2 P. Wms. 612. not. 1. 1 Vern. 462. 2 Vern. 673. Prec. Ch. 318. 1 Atk. 501. 512. Barnard. 43. 3 Atk. 645. 1 Vef. 118. 2 Bro. Ch. Rep. 305.
[f] 2 P. Wms. 612. not. 1. 2 Vef. 207. 262. 1 Burr. 227.
[g] 2 P. Wms. 612. not. 1. 2 Ch. Ca. 165. 1 Vern. 204. 321. 2 Vern. 92. 416. Prec. Ch. 267. 290. 318. 2 P. Wms. 276. Moſe. 68. 9 Mod. 106. 3 P. Wms. 134. Ca. Temp. Talb. 193. 1 Atk. 482. 502. 512. 555. 3 Atk. 69. 112. 1 Bro. Ch. Rep. 106. in not. 124. in not. 2 Bro. Ch. Rep. 108.

many exceptions; as, where the time of payment is poſtponed from the circumſtances, not of the perſon, but of the fund. As, where a term was created for daughters' portions, commencing after the death of the father and mother, on truſt to raiſe the portions from and after the commencement of the term, and the father died, leaving a daughter, the portion was decreed to be veſted, but not raiſeable during the life of the mother [h].

In reſpect to thoſe caſes where portions have been given out of land, and no time of payment expreſſed, it ſeems difficult to reconcile the determinations. According to one claſs, their intereſt is veſted immediately, and tranſmiſſible; according to another, ſuch portions ſhall not veſt, if the children die before they want them [i].

But if lands be deviſed for payment of portions, and one of the children entitled to a portion die after it is become due, though before the lands are ſold, the perſonal repreſentative of ſuch child will clearly be entitled to the money [k].

An executor may alſo claim by election; as where the teſtator at the time of his death was entitled out of ſeveral chattels to take his choice of one or more to his own uſe. If nothing paſſes to the grantee of a chattel before his election, it ought to be made in his lifetime [l]. As if A. give to B. ſuch of his horſes as B. and C. ſhall chuſe, the election ought to be made in the lifetime of B. [m]

[h] 2 P. Wms. 612. not. 1. 2 Atk. 127. 130. 507. Barnard. 327. 1 P. Wms. 457 2 P. Wms. 513. Ca. Temp. Talb. 117. 3 P. Wms. 414. 3 Atk. 319. Com. Rep. 716. 1 Vef. 44. 1 Bro. Ch. Rep. 119. 124. in not. Ambl. 167. 230. 266. 575. 1 Bro. Ch. Rep. 120. in not. 191. & in not. 193. in not.

[i] 3 P. Wms. 119. 172. 2 P. Wms. 612. not. 1. Prec. Ch. 195. 213. 2 Vef. 209. 1 Bro. Ch. Rep. 124. in not. 395. and vid. 2 Atk. 133. vid. alſo 11 Vin. Abr. 163, 164. 1 Vern. 326. 347. 2 Vern. 35. 72.

[k] 11 Vin. Abr. 163. 1 Vern. 276.

[l] Com. Dig. Election B. Hargr. Co. Litt. 145.

[m] 1 Roll. Abr. 726.

But where an intereſt veſts immediately by the grant, the election may be made by the executor as well as by the party himſelf [n]. As, if a fine be levied of a hundred acres, and the conuſee grant fifty to the conuſor for a term of years, his executor may chuſe which fifty he will have. So, if A. gives one of his horſes to B. and C., B. may elect after the death of C. which he will take, for an intereſt veſted in them immediately by the gift [o]. So, if the election determine only the manner or degree, in which the thing ſhall be taken, the executor, as well as the grantee himſelf, may make it; for in ſuch caſe, alſo, there is an immediate intereſt [p]. As, if a leaſe be granted to A. for ten, or twenty years, as he ſhall elect, the executor is entitled to the election.

[n] Hargr. Co. Litt. 145.

[o] 1 Roll. Abr. 725.

[p] Hargr. Co. Litt. 144. b.

CHAP.

CHAP. IV.

OF CHATTEL INTERESTS WHICH DO NOT VEST IN THE EXECUTOR, OR ADMINISTRATOR.

SECT. I.

Of chattels real which go to the heir.

I PROCEED now to enquire under what ſpecial circumſtances chattel intereſts ſhall go to the heir of the laſt proprietor.

The principle, which generally pervades the caſes, in which the heir, as diſtinguiſhed from the executor, ſhall be entitled to chattels, is this: that they are ſo annexed to, and conſolidated with, the inheritance, that they ſhall accompany it wherever it veſts [a].

[a] 2 Bl. Com. 427, 428.

And, firſt, in regard to chattels real: If A. ſeiſed in fee, grant an eſtate tail, or a leaſe for life, or years, reſerving rent, ſuch rent as accrues after his death, being incident to the reverſion, ſhall go to his heir, and not to his executors [b], although they are expreſsly named in the covenant [c]. If A. ſeiſed in fee, make a leaſe, reſerving rent to him, his executors and aſſigns, and die, the rent is determined, for the executors are not

[b] 3 Bac. Abr. 62. Harg. Co. Litt. 47.

[c] Harg. Co. Litt. 47. not. 9. Cro. Car. 207.

not entitled to it, inaſmuch as they are ſtrangers to the reverſion, which is an inheritance, nor ſhall it go to the heir becauſe he is not named [d]. But, if A. ſeiſed in fee, make a leaſe for years, reſerving rent to him, and his aſſigns, or to him, his executors and aſſigns, during the term, although there be deciſions to the contrary [e], the words, "during the term," ſhall be ſufficient to carry the rent to the heir. Where the rent is ſo reſerved, the intention of the parties is clearly expreſſed, that the leſſee is to pay the ſame during the continuance of the demiſe [f].

d Hargr. Co. Litt. 47. 2 Roll. Abr. 450. 1 Ventr. 161.

e See Noy 96. 12 Co. 36. Cro. Eliz. 217. 3 Bac. Abr. 63. in not.

f Hargr. Co. Litt. 47. not. 8. ibid. 202. 3 Bac. Abr. 62. 2 Saund. 367. 1 Ventr. 148. 161. Raym. 213. 2 Lev. 13.

In caſe the leaſe reſerve rent at Michaelmas, or ten days after; if the rent be not paid at Michaelmas, and before the ten days are expired, the leſſor dies, his heir, and not his executor, ſhall receive the rent; for, although it were in the election of the leſſee to pay it at Michaelmas, yet the ten days after are the true legal term, and, conſequently, the rent was not legally due before that period of time, and therefore is no chattel [g]. So, if the leſſor die on the day on which the rent is payable, after ſun-ſet, and before midnight, the heir, and not the executor, may demand the rent, for it is not, in ſtrictneſs, due till the laſt minute of the natural day, although it may be more convenient to pay it before [h]. So, where rent is granted to A. and his heirs, for life, and the lives of B. & C. the heir ſhall have the rent as a party ſpecially nominated, and as heir by deſcent [i]. So, although, for the arrears of a *nomine pœnæ*, the grantee

g 3 Bac. Abr. 63. 10 Co. 127.

h 3 Bac. Abr. 63. Hargr. Co. Litt. 202. not. 1. 1 Saund. 287. Salk. 578.

i 11 Vin. Abr. 168. Cro. Jac. 282. Vid. 2 Bl. Com. 259.

grantee himself, and, therefore, his executors, may have an action of debt, yet the *nomine pœnæ*, as an incident to the rent, shall descend to the heir[k]. So, a term for years, in trust to pay debts, and afterwards to attend the inheritance, shall go to the heir, and not to the executor[l]. So, if a term be raised for a certain purpose, and that purpose be answered, the heir shall have the beneficial interest in the same, whether it be so expressed or not[m]; but he shall take it as a term, and, consequently, as a chattel[n]. So, an annuity, although a chattel interest, is descendible to the heir[o].

But, if a debt be owing to A. and, in satisfaction of it, the debtor grants him an annuity, charged on lands for his own life, and redeemable, such annuity shall be part of A.'s personal estate[p]. But a term conveyed, as a fee, by lease and release, to J. S. and his heirs, by the word "grant." although it cannot operate as a fee to vest in the heirs of J. S. yet shall go to his personal representative[q]. So, if a lessee for twenty years, make a lease for ten years, reserving a rent during the last mentioned term, to him and his heirs, it shall be void as to his heir, and shall belong to his executors[r]. So, if A. possessed of a term for years, devise it to B. for life, remainder to the heirs of B., it seems that, on B.'s death, it shall go to his executor, and not to his heir[s]. So, if A. seised in fee, make a lease for years, reserving rent, and devise the rent to B., B.'s executor, and not

[k] 11 Vin. Abr. 168. Harg. Co. Litt. 162. b.

[l] 11 Vin. Abr. 172. 2 Vern. 645. Com. Dig. Biens. B. 2 Ca. Ch. 156. 160.

[m] 11 Vin. Abr. 169. 2 Ventr. 359

[n] 11 Vin. Abr. 171. 2 Vern. 139.

[o] 11 Vin. Abr. 153. Arg. 10 Mod. 237. Vide also 11 Vin. Abr. 146. pl. 25. & Co. Litt 374. b.

[p] Com. Dig. Biens. C. 1 Vef. 402.

[q] 11 Vin. Abr. 153. Chanc. Prec. 480.

[r] 1 Vent. 161.

[s] 11 Vin. Abr. 155. 3 P.Wms. 29.

not his heir, ſhall be entitled to the rent, becauſe B. had no more than a chattel intereſt [r]. So, where a copyhold eſtate was granted to A. for the lives of A. B. & C., and A. died inteſtate, it was held that his adminiſtrator ſhould have the eſtate during the lives of B. & C. [u].

[r] 11 Vin. Abr. 145. Dyer 5. b. not. 1. ibid. Cro. Eliz. 637. 651. Moore 549.

[u] 11 Vin. Abr. 151. in not. 1 Vern. 415.

So, a leaſe granted by a copyholder for one year *only*, ſhall be no forfeiture, for it is warranted by the general cuſtom of the realm, and ſhall be accounted aſſets in the hands of the executor of the leſſee [w].

[w] 11 Vin, Abr. 146. Poph. 188. Hargr. Co. Litt. 59. not. 4. 4 Co. 26. 9 Co. 75. b. W. Jo. 249. Litt. Rep. 233.

If A. grant a rent in fee to J. S. with a proviſo, that if it be in arrear, the grantee may enter the lands, and retain, till he be ſatisfied; the power of entry is an inheritance, and deſcends to the heir: but when entry is made, the party has merely a chattel intereſt in the lands, which, with the arrears, ſhall go to his executor [x].

[x] 11 Vin. Abr. 147. 1 Lev. 171. Raym. 135. 158. 1 Sid. 223. 262. 344.

If the grantee of a rent in fee take a leaſe for years of the lands out of which the rent iſſues, and die, his executor ſhall have the land, and the heir is precluded from the rent [t].

[t] 11 Vin. Abr. 147. Litt. Rep. 59.

So, a bond given by one parcener to pay the other, her executors or adminiſtrators, an annual ſum during the life of J. S. for owelty of partition, or as a compenſation for her ſhare's being of the leſs value, ſhall go to the executor and not to the heir. Becauſe, in ſuch caſe there is no grant of a rent, but

but a mere contract, and therefore the obligor had it in her election, either to pay the same, or to forfeit her bond [u]. And where articles of agreement were executed for the purchase of land, and six hundred pounds paid, but interest paid for the money by the vendor, and rent for the premises by the vendee: it was held, that on the latter's dying before the conveyance, his executor was entitled to the six hundred pounds, as part of his personal estate [w].

[u] 11 Vin. Abr. 150. 1 Vern. 133.

[w] 11 Vin. Abr. 149. 2 Chan. Rep. 138.

On the other hand, where A. died intestate, leaving two daughters, and after his decease four hundred pounds were found hidden; which the widow laid out in land, and settled it to herself for life, remainder to her two daughters in tail, remainder to her own right heirs: The administrators of the daughters claimed from the heir at law of the widow, two thirds as personal estate, and witnesses proved, that the same four hundred pounds were applied in the purchase: although the Master of the Rolls decreed for the administrators; yet on appeal the Lord Keeper reversed the decree on the ground, that money had no ear-mark, and could not be followed when invested in a purchase [x]. But where an executor in trust for an infant of a lease for ninety-nine years determinable on three lives, on the lord's refusal to renew but for lives absolutely, complied with his requisition, and changed the years into lives; on the infant's dying under twenty-one, this was held to be a trust for his administrator, and not for his heir [y]. So where trustees

[x] 11 Vin. Abr. 153. 2 Vern. 440.

[y] 11 Vin. Abr. 155. 3 P. Wms. 99.

truſtees purchaſed lands in fee ſimple with the infant's money, and the infant died in his minority, it was held that the land ſhould be accounted part of the perſonal eſtate, and ſhould go to his adminiſtrator [z]. So, where committees of a lunatic inveſted part of his perſonal eſtate in the purchaſe of lands in fee, the court declared it ſhould be deemed perſonal property, decreed an account, the land to be ſold, and the money to be divided among the next of kin. For it ſhall not be in the power of a guardian or truſtee to change the nature of the eſtate. But it appears, that if in ſuch caſe the truſtees obtain a decree in equity for the purchaſe, the court will maintain its decree, and then the eſtate ſhall go to the heir, and not return to the perſonal fund, if there be no ground to impeach the truſtees of fraud [a].

[z] 11 Vin. Abr. 151. 2 Chan. Rep. 377.

[a] 11 Vin. Abr. 151. 2 Vern. 192. 2 Freem. 209. 1 Vern. 435.

With reſpect to mortgages, inaſmuch as courts of equity conſider ſuch contracts as merely perſonal, the mortgage money is in general held to be part of the perſonal eſtate, and to belong to the executor of the mortgagee. But, under ſpecial circumſtances, it ſhall be regarded in the light of real property, and ſhall go to the heir [b].

[b] Powell on Mortgages, 2d vol. 682—698.

At law, if the condition or defeazance of a mortgage of inheritance make no mention either of heirs, or executors, to whom the money ſhall be paid, in that caſe the money ought to go to the executors, inaſmuch as it was originally derived out of the perſonal eſtate, and therefore in natural juſtice

juſtice ought to return thither. If the defeazance appoint the money to be paid either to the heir, or executors, and the mortgagor pay the money at or before the day, he may elect to pay it either to the heir, or the executor. If the day of payment be paſt, and the mortgage forfeited, all election is gone; for at law there is no redemption. There can be a redemption only in equity, and equity will not revive the election; but conſiders the caſe the ſame as if neither heir nor executor had been named. And as in that caſe the law will give it to the executor; equity, which ought to follow the law, will decree it to the ſame perſon. Hence, therefore, when the ſecurity deſcends to the heir of the mortgagee attended with an equity of redemption, as ſoon as the mortgagor pays the money the land ſhall belong to him, and the money only to the mortgagee, which is merely perſonal, and ſo accrues to his executor. Nor will it appear hard, that the heir ſhould be decreed to make a re-conveyance without having the money which comes in lieu of the land, if it be conſidered, that the land was no more than a ſecurity, and that after payment of the money a truſt exiſts for the mortgagor, which the heir of the mortgagee is bound to execute.

Nor is it material that the executor of the mortgagee has aſſets without ſuch money. Aſſets ſhall not be the meaſure of juſtice between the parties. The heir either ought to have the money if there were no aſſets, or ought not to have it although there

there were. Nor is the principle varied by there being no perſonal covenant on the part of the mortgagor to pay the money: For although the claim of the mortgagee's executor would be ſtrengthened by ſuch a covenant, yet it ſhall avail him without it [c]. And although a mortgage in fee be conditioned, that the mortgagor ſhall pay the money to the mortgagee, his heirs, executors, adminiſtrators, or aſſigns, and the mortgagee die before the forfeiture of the mortgage, whereby the mortgagor has his election at law to pay the money to either, yet in equity it ſhall belong to the executor; for in mortgages in fee, the mortgagee's heirs are truſtees for his perſonal repreſentatives [d]. In ſhort, mortgages are deemed in equity to be mere chattel intereſts, and to belong to the executor of the mortgagee, unleſs his intention to the contrary be declared in expreſs terms by the contract [e], or by his will, or be evidently implied by his conduct. As, if he foreclose, or procure a releaſe of the equity of redemption, and obtain actual poſſeſſion of the premiſes. So, where a mortgage in fee deſcended on the heir at law of the mortgagee, and the perſonal repreſentative of the mortgagee ten years after the money had been paid to ſuch heir, filed a bill for the ſame, it was decreed to him, but without intereſt [f].

[c] 11 Vin. Abr. 148. and in not. 2 Freem. 143.

[d] 2 Ventr. 351. Barnard. 50.

[e] Off. Ex. Suppl. 47. Hargr. Co. Litt. 210.

[f] 2 Ventr. 348.

Nor ſhall a ſpecific legacy to the executor bar him of money due on mortgage; as, where a mortgagee in fee, after bequeathing ſeveral legacies, gave one hundred pounds to his executor, expreſsly

directing, that his legacy ſhould not be paid till debts and other expences were diſcharged, yet the court decreed in his favour againſt the heir [g]. So, if the mortgagor ſhall fail to redeem, the heir of the mortgagee ſhall convey the land to the executor. As, where the mortgage was forfeited, though the heir of the mortgagee were in poſſeſſion by deſcent, and there were no deficiency of aſſets, on the mortgagor's not offering to redeem, the heir of the mortgagee was decreed to make ſuch conveyance: for ſince the money, as part of the perſonal eſtate, would have gone to the executor, he is entitled to the land as a recompence [h]. So, where a copyhold was mortgaged by ſurrender to A. who was admitted tenant, and died, leaving B. his ſon, and heir, and executor: B. entered, and was alſo admitted, and afterwards by his will, but without any ſurrender to the uſe of the ſame, deviſed it to C. who, on B.'s death, became the perſonal repreſentative of A. and exhibited his bill againſt D. who was heir at law of A. and B. and who claimed this as a real eſtate, the forfeiture having been ſo long incurred, two deſcents having been caſt, more being due on the eſtate than its value, the mortgagor having by his anſwer refuſed to redeem, and ſubmitted to be foreclоſed, and the deviſe by B. to the plaintiff being void at law for want of a ſurrender to the uſe of the will: it was decreed to C. as the perſonal repreſentative of A. inaſmuch as there was no foreclоſure, nor releaſe of the equity of redemption in the life-time of the mortgagee, and, on appeal, the decree was affirmed [i].

[g] 2 Ca. Ch. 187. 1 Vern. 412.

[h] 2 Chan. Ca. 50. 187.

[i] 2 Vern. 367. 1 Eq. Ca. Abr. 273. 328. vid. 2 Vern. 193.

If on a mortgage being forfeited, the mortgagor releaſes to the heir of the mortgagee in fee, yet the executor of the mortgagee ſhall have the benefit of the eſtate, although there be no debts. So, in the caſe of foreclosure of a mortgage, or that the mortgage be of ſo ancient a date, as in the ordinary courſe of the court it is not redeemable, it ſhall belong to the perſonal repreſentative of the mortgagee: for unleſs the mortgagee were actually in poſſeſſion, it ſhall be conſidered as perſonal eſtate [k]. So, where a wife had a mortgage in fee of a copyhold, and died leaving iſſue, and the iſſue was admitted, and died, and then the huſband, as adminiſtrator to his wife, claimed the copyhold as a mortgage, and conſequently part of his wife's perſonal eſtate; it was decreed to him againſt the heir at law, although the latter had been admitted [l]. So, a mortgage of an inheritance to a citizen of London hath been held to be part of his perſonal eſtate, and diviſible according to the cuſtom [m].

[k] 2 Vern. 193.

[l] 1 Vern. 170.

[m] 1 Chan. Ca. 285. 1 Vern. 4.

But if the poſſeſſor of the eſtate conceive himſelf to hold it in fee, his intereſt will not be conſidered as perſonal againſt his evident intention; as, if an eſtate in mortgage be ſold by the mortgagee abſolutely and fraudulently to a third perſon, the purchaſe money, on repayment by the vendor after the death of the vendee, will go to his heir; for the intention of the vendee was to alter the nature of his property, and to inveſt the money in the purchaſe of land, and therefore the court will conſider it

it as real property [n]. So, if it appears to be the intention of the mortgagee that the mortgage ſhould paſs by deviſe as a real eſtate, the executor will not be entitled [o]. As, where the teſtator had ſeveral mortgages, and among the reſt a mortgage in fee of lands in F. and deviſed his mortgages to his two daughters, their executors, and adminiſtrators, and his lands in F. on which he had entered on forfeiture of the mortgage to them, and their heirs: M. one of the daughters died without iſſue, H. her huſband and adminiſtrator claimed a moiety of the lands in F. as a mortgage not foreclоſed, nor of which the equity of redemption was releaſed, and therefore part of his wife's perſonal eſtate; but it was held, that although it were a mortgage, as between a mortgagor and mortgagee, and therefore perſonalty; yet the teſtator's intention was, that it ſhould paſs to his daughters as a real eſtate to them and their heirs, and that, inaſmuch as M. was dead without iſſue, it deſcended to her ſiſters, as her heirs at law, and that H. was entitled to no part of the ſame in the nature of perſonal eſtate [p]. But where a mortgage was deviſed as real eſtate after a decree of foreclоſure *niſi*, that is, unleſs cauſe were ſhewn to the contrary, it was held to be perſonal eſtate for payment of debts, if the aſſets were inſufficient, although conſidered as real eſtate between deviſor and deviſee [q]. A mortgage will not paſs as land under a general deſcription applicable to it in point of locality, if, from other circumſtances, it be evident that the owner regarded it as perſonal property [r].

[n] 1 Vern. 271.

[o] 2 Burr. 969.

[p] 2 Vern. 581. Gilb. Rep. in Chan. 2 Chan. Prec. 265.

[q] Moſely, 364.

[r] 2 Burr. 969.

Where money secured by mortgage, to which the executor was entitled at law, was articled to be laid out in land, and settled on the issue of the marriage, on special verdict it was adjudged to be bound by the articles [s].

[s] Vid. 3 P. Wms. 217.

If the parson of a church be seised of the advowson in fee, and die, in such case the heir and not the executor shall present; because at the same time the avoidance vests in the executor, the inheritance descends to the heir; and where two titles concur in an instant of time, the elder shall be preferred [t]. But if A. be seised of an advowson in gross, or in fee, appendant to a manor, and an avoidance happen in his life-time, his executor and not his heir shall present, inasmuch as it was a chattel vested, and severed from the manor [u]. But if the next presentation be granted to A. his heirs, and assigns, it is clearly a mere chattel, notwithstanding the word "heirs:" It is but one turn, and where the thing is a chattel, the word "heirs" cannot make it an inheritance [w]. So, if a man grant the two next presentations of a church, they are chattels, and, if the grantee dies, the executor shall have them, and not the heir [x].

[t] 11 Vin. Abr. 169. 3 Bac. Abr. 61. 3 Lev. 47. 3 Salk. 280. S. C.

[u] 11 Vin. Abr. 145. Fitzh. N. B. 33.

[w] 11 Vin. Abr. 173. Br. Chattels, pl. 6.

[x] 11 Vin. Abr. 173. Br. Chattels, pl. 20.

If an inheritor of tithes die after the tithes are set out, they shall go to his executor, and not to his heir [y].

[y] Com. Dig. Biens, A. 2. Off. Ex. 60. 3 Bac. Abr. 64.

The interest denominated the year, day, and waste, which has been already explained [z], is but a

[z] Vid. supr. 110.

chattel; and although granted by the crown to A. and his heirs, ſhall go to his executors [z].

[z] 11 Vin. Abr. 175. Off. Ex. 54.

Charters and deeds, court rolls, and other evidences of the land, as well as the cheſts in which they are uſually kept, ſhall paſs with the land to the heir, and ſhall not go to the executor [a]. So, where a bill was filed in chancery for an antique horn, with an ancient inſcription, on the ground that it had immemorially gone with the plaintiff's eſtate, and been delivered to his anceſtors by which to hold the land, the court was of opinion, that if the land were of the tenure called cornage, the heir had a title to this monument of antiquity at law [b]. So, if land be ſold by A. on condition, that if the purchaſe money be not paid by a limited day, then that he ſhall re-enter; and A. die, here, although there be a debt due to the executor, and no land deſcended to the heir of A. yet the heir ſhall have the deeds, inaſmuch as upon him the condition deſcended [c]. But if A. deliver a charter to B. to redeliver to him, and his heirs having no title to the land, his executor, and not his heir, ſhall have this charter, becauſe it was only a chattel without the land [d].

[a] Off. Ex. 63. 3 Bac. Abr. 65.

[b] 3 Bac. Abr. 65. 1 Vern. 273. Harg. Co. Litt. 107.

[c] Off. Ex. 63.

[d] 11 Vin Abr. 145. Fitzh. Detinue, pl. 7.

So, if the writings of an eſtate are pawned or pledged for money lent, they are conſidered as chattels in the hands of the creditor, and in caſe of his deceaſe, they will go to his perſonal repreſentative as the party entitled to the benefit accruing from the loan [e].

[e] 3 Bac. Abr. 65. Noy, Max. 50.

SECT. II.

Of chattels perſonal which go to the heir: and herein of heir-looms.

WITH reſpect to chattels perſonal, and animate, the heir has a qualified poſſeſſory property, in deer in a park, hares, or rabbits in a warren, doves in a dove-houſe, pheaſants, and partridges in a mew, ſwans, though unmarked, in a private moat or pond, or kept in water within a manor, or at large, if marked, and in bees in a hive, or, as it has been held by ſome authorities, though not in a hive, *ratione ſoli*, in reſpect of his ownerſhip in the ſoil. He is, alſo, entitled to fiſh in a private pond or piſcary. Theſe various animals ſhall all go with the inheritance, for without them it is incomplete [a]. And ſuch, we may remember, is the property that ſhall veſt in the executor, if the teſtator had a leaſe for years in the land [b].

[a] Hargr. Co. Litt. 8. Com. Dig. Biens. B. 1 Roll. Abr. 916. Off. Ex. 53. 11 Vin. Abr. 166. 2 Burn Juſt. 369. 7 Co. 15. b. 3 Bac. Abr. 64. 2 Bl. Com. 427.

[b] Hargr. Co. Litt. 8. not. 10. Vid. ſupr. 107. 113.

With regard to chattels perſonal, and vegetable, not only timber trees, as oak, beech, cheſnut, walnut, aſh, elm, cedar, fir, aſp, lime, ſycamore, birch, poplar, alder, larch, maple, and hornbeam, but alſo trees of every other deſcription, belong to the ſoil, and, unleſs ſevered during the life of the anceſtor, are the property of his heir [c]. So, likewiſe, are all ſpecies of fruits, if hanging on the tree at the time of his anceſtor's death.

[c] Com. Dig. Biens. H. 3 Bac. Abr. 64. Off. Ex. 59.

Graſs,

Graſs, alſo growing, though ready to be mown for hay, ſhall deſcend, with the land, to the heir, for theſe are either natural or permanent profits of the earth. He is alſo entitled to ſuch hedges and buſhes as are ſtanding at that time [d].

[d] Off. Ex. 59. 3 Bac. Abr. 64.

But, as I have already ſtated, corn, which is raiſed by yearly cultivation, ſhall go to the executor, to compenſate for the expence and labour of tilling, manuring, and ſowing, the lands, and for the encouragement of huſbandry, which is of ſo public a concern [e].

[e] Off. Ex. 59. 3 Bac. Abr. 64.

The ſame law, on a ſimilar principle, extends to other emblements, as hops, ſaffron, hemp, and the like [f].

[f] Off. Ex. 59. 3 Bac. Abr. 64.

It has been aſſerted by a learned writer [g], that roots of all kinds, ſuch as parſnips, carrots, turnips, and ſkirrets, ſhall go to the heir, ſince they cannot be taken without digging and breaking the earth, which muſt of neceſſity be a detriment to the inheritance. It ſeems, however, perfectly clear, that theſe articles, as requiring an annual cultivation, fall within the like reaſoning, which the law has adopted in regard to corn, and, conſequently, ſhall belong to the executor [h].

[g] Off. Ex. 62, 63. Vid alſo Gilb. L. of Ev. 249.

[h] Hargr. Co. Litt. 55. b. 2 Bl. Com. 123.

But things which produce no annual profit are not comprehended under the name of emblements; therefore, although the teſtator himſelf hath ſown the land with acorns, or planted it with oaks,

alders, elms, or other trees, they ſhall not be claſſed as emblements, but ſhall belong to the heir[i]. So, if the teſtator improved the natural produce, either by trenching, or by ſowing hay-ſeed, ſuch increaſe ſhall go to the heir; for the executors have no property in the natural produce, and, in ſuch inſtances, that which was artificial cannot be diſtinguiſhed from it[k]. Wall fruit alſo, though greatly improved by culture, ſeems to fall within the ſame principle, and to be the property of the heir. But the executor, we have ſeen, is entitled to hops, though growing on ancient roots, for they are produced by manurance and induſtry[l].

[i] 2 Bl. Com. 123. Com. Dig. Biens. G. 1. Hargr. Co. Litt. 55. b.

[k] Com. Dig. Biens. G. 1. Gilb. L. of Ev. 249. Hargr. Co. Litt. 56.

[l] Hargr. Co. Litt. 55. b. Cro. Car. 515. Vid. ſupr. 115.

Although timber trees originally belong to the ſoil, yet, if A. ſeiſed in fee, ſell the timber trees on his land to B. and B. die before they are felled, they ſhall belong to his executor[m]. So, if a man ſell his land, reſerving the timber trees, they remain in him by particular contract, as chattels diſtinct from the ſoil, and ſhall go to his executor. For, in both theſe caſes, in conſtruction of law, they are abſtracted from the earth, although they are not actually ſevered by the axe[n].

[m] 3 Bac. Abr. 64. Off. Ex. 59, 60.

[n] 3 Bac. Abr. 64. Off. Ex. 60.

But, if a tenant in tail ſell the timber trees on his ſoil, ſuch ſale will not be effectual without docking the intail, unleſs they were actually felled in the life-time of ſuch tenant, otherwiſe they will deſcend, with the land, to the iſſue[o]. So, if A. leaſe lands for life or years, excepting the trees, they

[o] 3 Bac. Abr. 64. Hob. 173, 11 Co. 50.

they continue parcel of the inheritance, so long as they are annexed to the land, and descend with it to the heir. So, if a feoffment be made excepting the trees, and the feoffee afterwards buy them, they are re-annexed to, and become part of, the inheritance [p]. So, where a lessee for years purchased trees growing on land, and had liberty to cut them within eighty years, and he afterwards bought the inheritance of the land, and died; it was held, that the executor should not have the trees, for, although they were once chattels, yet, by the purchase of the inheritance, they were re-united to the land [q].

[p] Com. Dig. Biens. H. 11 Co. 50. 4 Co. 63. b.

[q] 11 Vin. Abr. 168. Ow. 49.

Such personal chattels inanimate, as go to the heir with the inheritance, and not to the executor, are, for the most part, denominated heir-looms. The termination loom, in the Saxon language, signifies a limb, or member; consequently heir-looms denote limbs or members of the inheritance. They are such things as cannot be taken away without damaging or dismembering the freehold. Whatever, therefore, is strongly affixed to the inheritance, and cannot be severed from it without violence or damage, *quod ab ædibus non facilè revellitur*, is a member of the same, and shall pass to the heir, as chimney-pieces, pumps, tables, and benches, which have been long fixed [r]. The law is the same in regard to coppers, leads, pales, posts, rails, window-shutters, windows, whether of glass or otherwise, wainscots, doors, locks, keys, mill-stones fixed to a mill, anvils, and the like.

[r] 2 Bl. Com. 427, 428. 12 Mod. 520.

like. They are annexed to the freehold, and are held to form a part of it [s].

[s] 4 Burn Eccl. L. 256. 3 Bac. Abr. 63 Off. Ex. 62. 4 Co. 63, 64.

Although pictures and looking-glaſſes generally go to the executor, as perſonal chattels, yet, it has been held, that if they are put up inſtead of wainſcot, they ſhall belong to the heir. He has a right to the houſe entire, and undefaced [t].

[t] 2 Vern. 508.

But, at ſo remote a period as that of Henry the ſeventh, it was adjudged, that if the leſſee annexes any chattel to the houſe for the purpoſes of his trade, he may diſunite it during the continuance of his intereſt, if he can do ſo without prejudice to the freehold. And, therefore, that if ſuch leſſee be a dyer, and erect a furnace in the middle of the floor, not affixed to any wall, he, and by conſequence his executor, may take it down, during the term, if it can be removed without injury to the inheritance; that, while the term continues, he is the owner both of the floor and of the furnace, but that, if it be not ſevered while his intereſt ſubſiſts, it goes to the leſſor, or his heirs, inaſmuch as the leſſee is not maſter of both the ſubjects of alteration [u].

[u] 3 Bac. Abr. 63. Keilw. 88. Ow. 70, 71. Off. Ex. 60, 61. 1 Atk. 477. Salk. 368.

In modern times the doctrine of annexation has, on principles of public policy, been gradually relaxing; therefore, if things of this ſpecies can be removed without injury to the fabric of the houſe, or the ſoil of the freehold, they ſhall, in general, be the property of the executor [w]. Thus, modern

[w] 3 Bac. Abr. 63. in not. Ambl. 113. 2 Str. 1142.

modern tables, although fastened to the floor, grates, iron ovens, jacks, clock cases, in whatever mode annexed to the freehold, have by more recent cases been held to belong to the executor [k]. So, also have hangings, tapestry, beds fastened to the cieling, and iron backs to chimnies [l]. So, likewise in favour of trade, brewing vessels, vats for dyers, and soap-boilers coppers. So also furnaces, though fixed to the freehold, and purchased with the house [m]. It has also been ruled, that a cyder mill erected on the land shall go to the executor and not to the heir. And in a case where the litigating parties were the executor of the tenant for life, and the remainder-man, the Lord Chancellor seemed to be of opinion, that a fire-engine set up for the benefit of a colliery, as between heir and executor, might in some instances be considered as personal property [n]. Such latitude encourages improvements, and is beneficial to trade. But if the subject be not capable of removal without injury to the freehold; as, if a furnace is so affixed to the wall of a house as to be essential to its support, it shall not be taken away by the executor [o].

[k] 4 Burn Eccl. L. 257.

[l] 4 Burn Eccl. L. 256. 259. L. of Ni. Pr. 34. 2 Str. 1141. 1 Atk. 477.

[m] Salk. 368. L. of Ni. Pr. 34. 1 Atk. 477. 3 Atk. 14. 16. 11 Vin. Abr. 167. 172. 2 Freem. 249. Hargr. Co. Litt. 53. not 5.

[n] Lord Hardwicke in Lawton v. Lawton. 3 Atk. 15.

[o] Off. Ex 61. 4 Burn Eccl. L. 256. 11 Vin. Abr. 166.

The ancient jewels of the crown are also held to be heir-looms, for they are necessary to maintain the state, and to support the dignity of the existing sovereign [p].

[p] 2 Bl. Com. 428. Hargr. Co. Litt. 18. b.

So, also the collar of S. S. is an heir-loom, and shall go to the heir [q].

[q] 11 Vin. Abr. 167. Ow. 124.

There

There are alſo other perſonal chattels, which deſcend to the heir in the nature of heir-looms; as ancient portraits of former owners of the manſion, though not faſtened to the walls, a monument or tombſtone in a church, or the coat-armour of his anceſtor there hung up, with the pennons, and other enſigns of honour ſuited to his degree [r]. Pews, alſo, in a church, may immemorially deſcend from the anceſtor to the heir, as appurtenant to his houſe [s].

[r] 2 Bl. Com. 429. Harg. Co. Litt. 18. b.

[s] 2 Bl. Com. 429. 12 Co. 105.

By the ſpecial cuſtom of ſome places, carriages, and alſo various articles of houſehold furniture, and implements, may be heir-looms. But ſuch cuſtom muſt be ſtrictly proved [t].

[t] 2 Bl. Com. 428. Harg. Co. Litt. 18. b.

On the other hand, a granary built on pillars in Hampſhire, is, by cuſtom, a chattel, and belongs to the executor [u].

[u] 11 Vin. Abr. 154.

The heir is likewiſe entitled to other perſonal chattels inanimate, to which this appellation of heir-looms does not belong. An annuity, although only a chattel-intereſt, is, as we have ſeen [w], deſcendible to the heir [x]. So, a grant from the crown of one thouſand pounds *per annum*, out of the four and a half *per cent.* Barbadoes duty, with collateral ſecurity for payment out of other revenue, although a mere perſonal chattel, having no relation to lands or tenements, nor partaking of the nature of a rent, was adjudged to the heir [y].

[w] Vid. ſupr. 137.

[x] 11 Vin. Abr. 153. argdo 10 Mod. 237. vid. alſo 11 Vin. Abr. 146. pl. 25. Dr. & Stud. 90.

[y] Com. Dig. Biens, A. 2. 2 Veſ. 170.

So,

So, where a copyhold tenement was burnt down, and money, collected on briefs for rebuilding it, was lodged in the hands of a guardian of the tenant in tail who died under age; it was held that the money ſhould go to his heir, both becauſe of the intail, and becauſe it was copyhold; but that allowance ſhould be made to his perſonal repreſentative for the amount of the intereſt of the money from the time it was ſo lodged to the death of the infant [z].

[z] Com. Dig. Biens (B). 1 Veſ. 460.

If A. recover land and damages, or a deed relative to land and damages, and die before execution; his heir ſhall have execution for the land or deed, and the executor for the damages [a].

[a] 11 Vin. Abr. 145. 169. Cro. Car. 227. Off. Ex. 93.

SECT. III.

Of chattels which go in ſucceſſion.

CHATTELS given to a corporation aggregate, as the dean and chapter of a cathedral church, the mayor and commonalty of a city, the head and fellows of a college, ſhall go in ſucceſſion: but in caſe of a ſole corporation, whether created by charter or preſcription, as a biſhop, parſon, vicar, maſter of a hoſpital, and the like, chattels real and perſonal in poſſeſſion, and in action, belong to their reſpective executors. Such property ſhall no more go to their ſucceſſors, than it ſhall go to an heir; for

for succeſſion in a body politic is inheritance in caſe of a private perſon [a]. So, if the chattel be granted to ſuch ſole corporation and his ſucceſſors: As, if a term for years be granted to a biſhop, and his ſucceſſors, his executor ſhall have it [b]. So, if an obligation or other ſpecialty be executed to him and his ſucceſſors, he can take it only as a private individual, and not in his corporate capacity [c].

[a] Com. Dig. Biens. C. Franchiſes F. 16. 4 Co. 65. Harg. Co. Litt. 9. a.

[b] 1 Roll. Abr. 515.

[c] 4 Co. 65. Dy. 48. a. 2 Bl. Com. 430, 431.

But by cuſtom a corporation ſole may take goods and chattels in ſucceſſion, as in London, where the chamberlain is a ſpecial corporation for taking bonds for orphanage-money. And ſuch cuſtom has been frequently adjudged good [d]. Alſo in ſome inſtances, particularly of chattels in action, the law is the ſame without a cuſtom [e]. As if the preſident of the college of phyſicians recover in debt againſt a party for practiſing without a licence, his ſucceſſor, and not his executor, ſhall have a *ſcire facias* on the judgment, for the debt was recovered as due to him and the college [f].

[d] Hargr. Co. Litt. 9. a. not. 1. 4 Co. 64. b. Cro. Eliz 464. 682.

[e] Harg. Co. Litt. 9. a. not. 1. Vin. Abr. tit. Corporation L.

[f] 1 Roll. Abr. 515.

So, if the maſter of an hoſpital recover in that character the arrears of an annuity due to the hoſpital, and die, they go to his ſucceſſor, and not to his executor [g].

[g] 1 Roll. Abr. 515.

SECT.

SECT. IV.

Of chattels which go to a deviſee, or remainder-man: and herein of emblements, and heir-looms.

A DEVISEE of the lands is entitled to all thoſe chattel intereſts which have been ſtated to belong to the heir [a]; and in one reſpect he has an advantage to which the heir is not entitled. Such deviſee, and not the executor of the deviſor, ſhall have the emblements. Thus it has been held, that if A., ſeiſed in fee of land, ſow, and deviſe it to B. for life, remainder to C. in fee, and die before ſeverance, B. ſhall have the emblements, and not the executor of A. Or, that if B. die before ſeverance, his executor ſhall not have them, but they ſhall go to him in remainder. Or that, if the deviſe be only to B, and B. die before ſeverance, there his executor ſhall have them, although B. did not ſow. Theſe points were ſo adjudged on the principle, that the deviſee, in relation to the chattels belonging to the lands, ſtands in the place of the executor by the expreſs terms of the will [b]. This diſtinction, however, ſeems not very reaſonable [c]: It appears ſtrange, that the corn ſhould paſs to the deviſee as appurtenant to the ſoil, and yet ſhall not deſcend to the heir. But a deviſee of the goods, ſtock, and moveables is entitled to growing corn in preference both to the deviſee of the land, and the executor [d].

[a] 2 Bl. Com. 428.

[b] Winch. 51. Gilb. L. of Ev. 248. Vid. Hob. 132.

[c] Hargr. Co. Litt. 55. b. not. 2.

[d] Winch. 51. L. of N. Prius 34.

In

In reſpect to the rights of the executor of tenant for life, as oppoſed to thoſe of the remainder-man, it is a general rule, that where a party hath an uncertain intereſt in land, and his eſtate determines, yet he hath a title to the corn that is ſown, and the other emblements on the land, though the property of the ſoil be altered [c]. With the view of giving all poſſible encouragement to agriculture, the law has created a property in the emblements, diſtinct and ſeparate from that of the ſoil, and has provided that ſuch property ſhall be at the entire diſpoſal of the owner, that he may not decline cultivation, leſt the harveſt ſhould be reaped by a ſtranger. Moreover, the tenant who has ſown has acquired a property in the corn by his expence and labour. It was his own in its original ſtate, and before it was committed to the earth; and his property ſhall not be diveſted by its being ſown on his own ground, and the leſs, on account of the ſkill and induſtry he has employed in raiſing it [f].

[c] Gilb. L. of Ev. 240.

[f] Gilb. L. of Ev. 240, 241.

On theſe principles the doctrine of emblements in reſpect to the executor of tenant for life is founded. Therefore, if ſuch tenant ſow the land, and die before ſeverance, inaſmuch as his eſtate was uncertain, and determined by the act of God, his executor ſhall have the corn, and he may take it from off the ground of the remainder-man [g]. So, it has been held, that at common law, on the death of tenant in dower, her executor was entitled to the corn; and that the ſtatute of Merton [h], which gives her

[g] Gilb. L. of Ev. 242. Hargr. Co. Litt. 55. b. 5 Co. 116. Roll. Abr. 726, 727.

[h] 20 H. 3. c. 2.

her the power of deviſing it, was paſſed only in affirmance of the common law [i].

[i] Gilb. L. of Ev. 245. Hargr. Co. Litt. 55. b.

If A., ſeiſed in fee of land, ſow, and then convey it to B. and die, before ſeverance, the corn ſhall belong to B. and not to the executors of A. on the principle, that every man's donation is to be taken moſt ſtrongly againſt him, and, therefore, it ſhall paſs not only the land itſelf, but alſo the chattels, which are incidental to it [k]. If A., ſeiſed in fee of land, ſow, and then convey it to B. for life, with remainder to C. for life, and B. die before the corn is reaped, C. ſhall have it, and not the executors of B., for B. had no property in the corn ariſing from his own charge, and induſtry, but merely by A.'s donation of the land, to which the corn is appurtenant; and by force of the ſame donation, by which B. had a right to the corn, C. is entitled to it after the death of B. [l].

[k] Gilb. L. of Ev. 247.

[l] Gilb. L. of Ev. 247. Hob. 132. Roll. Abr. 727.

If A., ſeiſed in fee, ſow land, and give it to B. for life, remainder to C. for life, and they both die before ſeverance, it ſhall go to A.; for when the force of the donation is ſpent, the property ſhall reſult to the donor [m]. If diſſeiſor of tenant for life ſow the land, and ſuch tenant die before ſeverance; his executor, and neither the diſſeiſor nor the reverſioner, ſhall have the corn [n]. But trees ſhall not be regarded in favour of the executor of the tenant for life, any more than of any other executor, as emblements, or as diſtinct from the ſoil; for they are parcel of the inheritance,

[m] Gilb. L. of Ev. 248. Hob. 132.

[n] 3 Bac. Abr. 64. Goulds. 143.

and are planted for the benefit of future generations [o]. Therefore, if such tenant plant oaks, or other timber trees, or trees not timber, or hedges, or bushes, they shall not go to his executor, but to him in remainder [p]. If, as we have seen, the tenant in fee make a lease, excepting the trees, and afterwards grant the trees to the lessee, they are not re-annexed to the inheritance, but the lessee has an absolute property in them, and they shall go to his executor [q].

[o] Gilb. L. of Ev. 242. 2 Bl. Com. 123. Co. Litt. 55. b.

[p] Gilb. L. of Ev. 249. Com. Dig. Biens. G 1 H. Harg. Co. Litt. 55. b. Lat. 270.

[q] Com. Dig. Biens. H. 4 Co. 63. b.

But if tenant by the curtesy, or in dower, or after possibility of issue extinct, cut down trees, they shall not go to the executor, but to the remainderman, or reversioner [r]. So, if A., tenant for life, with remainder to B. for life, cut down trees, they shall belong to him in reversion [s].

[r] Com. Dig. Biens H. 4 Co. 63. 11 Co 82.

[s] Com Dig. Biens. K. Al. 81.

Yet, if there be a lessee for life, or years, without impeachment of waste, he has such an interest, and property in timber trees, that, in case they are cut down in his life-time, or during the term, they shall belong to his executor [t].

[t] Com. Dig. Biens. H. Hargr. Co. Litt 220. Moore 327. 11 Co. 82. b.

If the trees are thrown down by tempest in the life-time of such lessee, or during the term, they shall go to his executor, and vest equally as if they had been severed by the act of the party [u]. But a lessee, though without impeachment of waste, has not an absolute property in the trees; for if they are not cut down in his life-time, or during the term, his executor shall not have them, but they

[u] 11 Co. 84. 1 Roll. Rep. 383.

ſhall go to the leſſor, as annexed to the freehold [w]. So, if A., tenant for life, without impeachment of waſte, with power to cut trees, and to make leaſes for three lives, leaſe for three lives, excepting the trees, and die before they are cut, the trees are reannexed, and ſhall not be ſevered by his executor [x].

[w] 1 Roll. Rep. 182. Lat. 270.

[x] Lat. 163.

A tenant *pur auter vie*, is conſidered by the law, in regard to emblements, in the ſame light as a tenant for his own life; and, therefore, if a man be tenant for the life of another, and the *ceſtui que vie* die after the corn be ſown, the tenant *pur auter vie*, and in caſe of his death, his executor, ſhall have the emblements [y].

[y] 2 Bl. Com. 123.

The advantages of emblements are alſo extended to the parochial clergy, by the ſtat. 28 *H.* 8. *c.* 11. [z]

[z] 2 Bl. Com. 123.

The leſſees of tenants for life at common law, on the death of the leſſors, exerciſed the unreaſonable privilege of quitting the premiſes, and paying rent to nobody for the occupation of the land ſubſequent to the laſt quarter-day, or other day aſſigned for the payment of rent. To remedy which, it is now enacted by ſtat. 11 *Geo.* 2. *c.* 19. § 15. that the executors of tenant for life, on whoſe death any leaſe determined, ſhall recover of the leſſee a rateable proportion of rent from the laſt day of payment to the death of ſuch leſſor [a].

[a] 2 Bl. Com. 124.

If a leſſee for life of a manor ſeize an eſtray, and die before the year and day are elapſed, it ſhall belong to his executor [b].

[b] 11 Vin. Abr. 145. Moore 11.

In regard to heir-looms, I have already ſtated, that the ſtrictneſs of the ancient rule has in later times been relaxed, as between the executor and the heir [c]. But it has been ſtill more ſo, as between the executors of tenant for life, or in tail, and the reverſioner [d].

[c] Supr. 152.

[d] L. of Ni. Pr. 34.

Hence it has been adjudged, that a fire-engine ſet up for the benefit of a colliery by tenant for life, or in tail, ſhall be conſidered as his perſonal eſtate, and ſhall go to the remainder-man. And indeed reaſons of public convenience operate more ſtrongly as between ſuch parties, than even as between heir and executor. A tenant for life would be diſcouraged from making improvements, if the benefit of them might devolve not on his perſonal repreſentatives, but on a remote remainder-man, perhaps the next day after the improvements were effected [e].

[e] Lawton v. Lawton, 3 Atk. 13. Lord Dudley v. Lord Warde, Ambl. 113.

CHAP.

CHAP. V.

OF THE CHATTELS WHICH GO TO THE WIDOW.

SECT. I.

Of the chattels real which go to the widow: and herein alſo of ſuch chattels real as belong to the ſurviving huſband.

IN contemplation of law, a complete unity of perſon ſubſiſts between the huſband and wife. As long as the relation continues, they are regarded as one individual. The very exiſtence of the wife is ſuſpended during the coverture, or entirely merged or incorporated in that of the huſband. On this principle, whatever perſonal property belonged to her when ſole, is veſted in the huſband by the marriage [a].

[a] 2 Bl. Com. 433. Com. Dig. Baron & Feme, D. 1.

And, firſt, in regard to chattels real: Some are in the nature of a preſent veſted intereſt, in others ſhe has only an intereſt poſſible, or contingent. Of the firſt claſs are leaſes for years, eſtates by ſtatute-merchant, ſtatute-ſtaple, or elegit, or any other chattel real in her poſſeſſion. The ſecond claſs is diſtinguiſhed into ſuch as are called poſſibilities, and ſuch as are denominated contingent intereſts; as, if a term of years be deviſed to A. for life, and

after A.'s death to B. B.'s intereſt in the reſidue of the term operates by way of executory deviſe, and is ſtyled a poſſibility. But, if a real eſtate be limited to A. for life, and after the deceaſe of A., and if B. die in A.'s life-time to C. for a term of years, this operates not as an executory deviſe, but as a remainder, and, therefore, is conſidered as a contingent intereſt [b].

[b] Hargr. Co. Litt. 351. not. 1.

In the chattels real of the wife, preſent and veſted, an intereſt in the nature of a joint-tenancy of the huſband and wife is created by the marriage, and is a conſequence of their legal unity, but ſubject to alienation by the huſband in his life-time [c]; for example, in caſe of a leaſe for years, he ſhall, during the coverture, receive the rents and profits of it; but if he does nothing more, on his dying before his wife, it ſhall ſurvive to her, and ſhall not go to his executor; but he may during the coverture alienate it, either directly, or conſequentially, by ſuch acts as ſhall induce an alienation. He may fell, ſurrender, or diſpoſe of it in his life-time at his pleaſure. On his attainder or outlawry, it ſhall be forfeited to the king, or it may be taken in execution for his debts [d].

[c] Plowd. 418. 2 Bl. Com. 435.

[d] 2 Bl. Com. 434. Hargr. Co. Litt. 46. b. Plowd. 263.

He has alſo during coverture a right to aſſign ſuch poſſible, and contingent intereſts as have been juſt mentioned, unleſs, perhaps, in thoſe caſes where the poſſibility, or contingency is of ſuch a nature that it cannot happen during his life. As where a leaſe is granted to the huſband and wife for

for their lives, with remainder to the executors of the ſurvivor [c]. Or unleſs in equity at leaſt, the future or executory intereſt in a term, or other chattel, were provided for the wife with the conſent of the huſband before marriage, for in that caſe his diſpoſition of it would be a breach of his own agreement [f].

[c] 10 Co. 51. Hargr. Co. Litt. 46. b. Com. Dig. Baron & Feme, E. 2.

[f] Hargr. Co. Litt. 351. not. 1.

If the huſband diſpoſe not of the chattels real of the wife in his life-time, and die before her, they ſhall not paſs by his will, nor ſhall they go to his executor; for, not having altered the property in his life-time, they were never transferred from the wife; but, after his death, ſhe ſhall remain in her ancient poſſeſſion [g].

[g] 2 Bl. Com. 434. Plowd. 418.

But, if the huſband grant the term, on condition that the grantee ſhall pay a ſum of money to his executors, though the condition be broken, and the executors enter, this is a diſpoſition of the term, and the wife is barred of it, for the whole intereſt was paſſed away [h].

[h] Com. Dig. Baron & Feme, E 2. Hargr. Co. Litt. 46. b.

If the huſband and wife be ejected of the term, and the huſband bring an ejectment in his own name only, and recover, this alſo is an alteration of the term, and veſts it in the huſband [i]; for his ſuing alone is expreſſive of his intention to diveſt the wife of her intereſt, and to treat the term as excluſively his own.

[i] 1 Roll. Rep. 359. Hargr. Co. Litt. 46. b. Sed vid. not. 6. ibid.

If he ſubmit the term to the arbitration of A. who awards it to B., it will be a diſpoſition by the huſband againſt his wife [k]. So, the huſband may make a leaſe of the term, to commence after his death, and it ſhall be good, although the wife ſurvive [l]; but he cannot charge ſuch chattel real beyond the coverture; as, if he grant a rent-charge out of the term, and the wife ſurvive, ſhe ſhall avoid the charge, for by her ſurvivorſhip ſhe is remitted to the term, of which the coverture did not diveſt her [m].

[k] Dyer 183.

[l] Cro. Eliz. 287. Poph. 5.

[m] Hargr. Co. Litt. 351. Plowd. 418.

Nor if there be judgment againſt him, can execution be ſued out after his death againſt the term [n]: nor ſhall it after his death be extended on a ſtatute or recognizance acknowledged by him [o]; nor, as it ſeems, for a debt due from him to the king [p]. Nor has his diſpoſition of part of the term the effect of a diſpoſition of the whole. As, if A. be poſſeſſed of a term for forty years in right of his wife, and grant a leaſe for twenty years, reſerving a rent, and die; although the executors of the huſband ſhall have the rent, for it was not incident to the reverſion, inaſmuch as the wife was not party to the leaſe, yet ſhe ſhall have the reſidue of the term [q]. If the term be extended, the wife ſhall have the term after the extent is ſatisfied [r]. If the huſband and wife mortgage the term, and the huſband pay the money, and enter and die, the wife ſhall have it [s]. If the wife and her huſband were joint-tenants of a rent-charge for their lives; the wife, in caſe ſhe ſurvive, ſhall have the arrears incurred

[n] 1 Roll. Abr. 344. 346.

[o] 1 Roll. Abr. 346.

[p] 2 Roll. Abr. 157. 1 Roll. Abr. 346.

[q] Hargr. Co. Litt. 46. b.

[r] 1 Roll. Abr. 344.

[s] 1 Roll. Abr. 344.

incurred during the coverture [t]. If the husband and wife make a lease reserving rent, and she assent after the death of the husband, she shall have the arrears incurred in his life-time [u]. Or, if the husband be entitled to an advowson in right of his wife, and, after an avoidance, but before presentation die, his wife and not his executors shall present [w].

[t] 1 Roll. Abr. 350. Moore 887.

[u] 1 Roll. Abr. 350.

[w] Com. Dig. Baron & Feme, E. 3. Co. Litt. 351.

In case the wife die before the husband, all the chattels real of the wife, in which there exists a present, actual, and vested interest, become absolutely and entirely his own by survivorship [x], and that without taking out administration to her [y]. To entitle himself to her chattels real, which are not so vested, he must make himself her representative, by becoming her administrator. It seems formerly to have been doubted, whether, if, having survived his wife, he died during the suspense of the contingency on which any part of his wife's property depended, his representative, or his wife's next of kin, had a right to the benefit of it; but by a series of authorities it is now settled, that the husband's representative is beneficially entitled, as well to this species of the wife's property [z], as to any other, which devolved to him either as survivor, or by virtue of the grant of administration. And, although the husband's right to such grant be personal only, and not transmissible, and, as I have before stated [a], the spiritual court be in such case obliged by the stat. 31 *E.* 3. to commit administration to the next of kin of the wife, yet such grantee

[x] Co. Litt. 300. Com. Dig. Baron & Feme, E. 2.

[y] Com. Dig. Baron & Feme, E. 2. Roll. Abr. 345.

[z] Hargr. Co. Litt. 351. not. 1.

[a] Supr. 86.

grantee is regarded in equity, as a mere truſtee for the repreſentative of the huſband [b].

[b] Sed vid. Hargr. Co. Litt. 351. not. 1. 1 Hargr. Law Tr. 475. in not.

If tenant in dower grant a leaſe for years, and marry and die, the huſband ſhall have the rent in arrear in his wife's life-time [c]. And by the ſtat. 32 *Hen.* 8. *c.* 37. arrears of rent due as well before as after coverture to the wife, ſeiſed in fee, in tail, or for life, are on her death given to the huſband. If the huſband be entitled to an advowſon in right of his wife, and he ſurvive, he ſhall have an avoidance which happened during the coverture [d]. If a wife were poſſeſſed at her marriage of a truſt term to her ſeparate uſe, the ſurviving huſband ſhall be entitled to it except in ſpecial caſes [e]; as, if, before marriage, it was ſettled on her with the aſſent of the huſband [f]. If the huſband and wife mortgage a term of the wife, and the huſband ſurvive, he ſhall have the equity of redemption [g].

[c] Moore 7.

[d] Com. Dig. Baron & Feme, E. 3. Hargr. Co. Litt. 351.

[e] Com. Dig. Baron & Feme, E. 2. 1 Fonbl. 98. 1 Vern. 7. 18. 2 Vern. 270. 2 Atk. 421. Sed vid. 2 Bro. Chan. Rep. 345.

[f] Com. Dig. Chancery 2 M. 9. Hargr. Co. Litt. 351. not. 1.

[g] Hob. 3.

If the huſband ſow the land, of which he is ſeiſed in right of his wife, and ſhe die, he ſhall have the profits [h]. Or, if he die before the wife, and before ſeverance, his executors ſhall be entitled to them; but it ſeems, that in the event of his ſo dying, if the lands were ſown before the marriage, the wife ſhall have the profits, and not the executors of the huſband; for the corn committed to the ground belongs to the freehold, and is not tranſferred to the huſband, and therefore as it was undiſpoſed of in his life-time, it devolves to the wife [i]. So, if A. ſeiſed in fee, ſow copyhold lands, and ſurrender

[h] Gilb. L. of Ev. 245. Hargr. Co. Litt. 55. b.

[i] Gilb. L. of Ev. 246. Hargr. Co. Litt. 55. b. not. 5. Roll. Abr. 727.

ſurrender them to the uſe of his wife, and die before ſeverance, it ſeems that the wife ſhall have the corn, and not the executors of the huſband; for this is a diſpoſition of the corn as appurtenant to the land, and, ſince the huſband diſpoſed of it during his life, it cannot belong to his executors [k]. But, if the huſband and wife be joint tenants, and the huſband ſow the land, and die, it ſeems, the corn ſhall go to the executor of the huſband, for the land is not cultivated by a joint ſtock; the corn is altogether the property of the huſband, and it ſhall not be loſt by being committed to their joint poſſeſſion, any more than if it had been ſown in the land of the wife only [l].

[k] Roll. Abr. 727.

[l] Gilb. L. of Ev. 245. Roll. Abr. 727. Sed vid. Hargr. Co. Litt. 55. b. et not. 7. Vin. Abr. tit. Emblements, pl. 16. Com. Dig. Biens. G. 2.

SECT. II.

Of the chattels perſonal which go to the widow: and herein, of ſuch perſonal chattels of the wife as go to the ſurviving huſband.

CHATTELS perſonal, or *choſes* in action, as debts on bond, ſimple contracts, and the like, do not veſt in the huſband, until he receives, or recovers them at law. When he has thus reduced them into poſſeſſion, they become abſolutely his own, and, at his death, ſhall go to his repreſentatives, or as he ſhall appoint by his will, and ſhall not reveſt in his wife [a].

[a] Bl. Com. 434. Hargr. Co. Litt. 351.

In

In respect to such *choses* in action as vested in the wife before her marriage, the husband must sue jointly with her to recover them [b]. As to such of the wife's *choses* in action, as accrued subsequent to the coverture, he may sue either in their joint names, or alone, at his pleasure [c].

[b] Com. Dig. Baron & Feme. V. 1 Roll. Abr. 347. Ow. 82. Cro. Eliz. 537. 2 Vef. 676. 1 Sid. 25.

[c] 2 Lev. 107. 3 Lev. 403. Al. 36. Vid. 7 Term Rep. 349.

If he join her in the action, and recover judgment, and die, the judgment will survive to her, on the principle, that his bringing the action in his own name alone, is a disagreement to the wife's interest, and indicates his intention, that it shall not survive to her. But, if he bring an action in the joint names of himself and his wife, the judgment is, that they both shall recover, and, therefore, such action does not alter the property, nor imply an intention on his part to do so, and, consequently, the surviving wife, and not the representative of the husband, is intitled to a *scire facias* on the judgment [d].

[d] Com. Dig. Baron & Feme. V. Hargr. Co. Litt. 351. not. 1. 2 Vef. 676. 1 Vern. 396.

Indeed it has been asserted by great authority, that, even in the case of the husband's suing alone for the wife's debt, and a dying before execution, his wife, and not his executors, shall be thus entitled [e].

[e] 3 Atk. 21.

Such chattels shall, *à fortiori*, survive to her, if the husband die before he has proceeded to reduce them into possession [f]. Hence a portion due to an orphan in the hands of the chamberlain of London, unless it be recovered or received by the husband,

[f] 2 Bl. Com. 434. Hargr. Co. Litt. 351.

husband, shall, on his death, go to his wife, and not to his executor, for it is clearly a *chose* in action [g]. So, if a debt be due to the wife, although the debtor become bankrupt, and the husband claim the debt, and pay the contribution-money, and die before any dividend, his wife, and not his executor, shall receive the debt, for by such payment the property shall not be altered [h]. So, if an estray come into the wife's franchise, in case the husband die without seizing it, his wife, and not his executors, are entitled to the seizure: In all these cases the husband's right is determined with the coverture [i].

[g] Com. Dig. Baron & Feme. E. 3. 2 Ventr. 341. Ca. Ch. 182.

[h] Com. Dig. Baron & Feme. E. 3. 2 Vern. 707.

[i] 2 Bl. Com. 434. Hargr. Co. Litt. 351. b.

But, if the husband grant a letter of attorney to A. to receive a debt, or legacy due to the wife, and A. receive it, but, before he pays it over, the husband die, it shall be considered as having vested in his possession, and shall go to his executors [k]. Such are the principles of law on this subject; but, in equity, it is held, that a settlement before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband, dying in her life-time, to her *choses* in action. But it has been asserted, that if it be not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced by the husband. So, if it be in consideration of part of her fortune, such things in action, as are not comprised in that part, it is said, survive to the wife.

[k] Roll. Abr. 342. Moore 452.

And,

And, in a case where a settlement was made to provide for the wife, without mentioning her personal estate, the Lord Keeper decreed, that such estate should belong to the representatives of the husband, and held, that in all cases where there is a settlement equivalent to the wife's portion, it shall be intended that the husband shall have the portion, although there be no agreement for that purpose [m].

[m] Hargr. Co. Litt. 351. not. 1. 3 P. Wms. 260. not D. Prec. Chan. 63. 412. 2 Vern. 502. Ca. Temp. Talb. 168.

Equity, also, considers money due on mortgage as a *chose* in action, and it seems to have been formerly understood, that, since the husband could not dispose of lands mortgaged to the wife in fee, without her, and the estate remained in her, she, or her representatives, were entitled to the money, as incident to it; but, that in regard to a mortgage debt, secured by a term of years, as the husband had an absolute power over the term, there was no obstacle to the debt's vesting in his representatives; but this distinction is exploded, and it is now held, that, although, in case of a mortgage in fee, the legal fee of the lands in mortgage continue in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt [n].

[n] Hargr. Co. Litt. 351. not. 1. 1 P. Wms. 458. 2 Atk. 207.

If the husband and wife have a decree in equity, in right of the wife, and the husband die, the benefit of the decree belongs to the wife, and not to the executor of the husband [o].

[o] Hargr. Co. Litt. 351. not. 1. 1 Chan. Ca. 27.

But,

But, if the wife's fortune be in the court of chancery, on the husband's death his representatives shall be entitled to it, subject to the same equity as before, in favour of the wife. In case of her death it shall become the absolute property of the husband; and it has been held, even where the court detained the fund, in order to enforce a provision for the wife, and made a decree for that purpose, and she survived her husband, yet, that on her death, his representatives were entitled to it, inasmuch as it had absolutely vested in him by law. In these cases, it seems to make no difference, whether there be any issue of the marriage, or not [p].

[p] 1 Fonbl. 88, 89. Prec. Chan 418. Ambl. 509.

In case the husband survive the wife, her chattels real, as we have seen, shall become his absolute property. But her *choses* in action shall go to her representatives, excepting the arrears of rent due to her, which, as I have before stated, on her death are, by stat. 32 *Hen.* 8. *c.* 37. given to the husband. The ground of the distinction is this: The husband is in absolute possession of the chattel real during coverture, by a kind of joint-tenancy with his wife, and therefore the law will not wrest it from him, though if he had died first it would have survived to the wife, unless he had altered the possession in his life-time: but a *chose* in action was never in his possession: He could acquire it only by suing in his wife's right, and, as after her death he cannot as husband bring an action in her right, because they are no longer one and the

the ſame perſon in law, therefore he can never as ſuch recover the poſſeſſion. But, in the capacity of her adminiſtrator, he may recover ſuch things in action as became due to her before, or during the coverture [q].

[q] 2 Bl. Com. 435.

In chattels perſonal, or *choſes* in poſſeſſion of the wife in her own right, as ready money, jewels, houſehold goods, and the like, the huſband hath an immediate, abſolute, and actual property devolved to him by the marriage, which never can reveſt in the wife, or her repreſentatives [r].

[r] 2 Bl. Com. 435. 3 Bac. Abr. 65. Dr. & Stud. Dial. 1. cap. 7.

Such chattels alſo as are given to the wife after the marriage ſhall belong to the huſband, and he ſhall be entitled to them, although they had not come to his poſſeſſion at the time of her death [s]. Thus it hath been held, that if a legacy be left to a wife, to be paid twelve months after the teſtator's death, and the wife die within that period, her huſband is entitled to it, for an immediate intereſt was veſted in him, and ſubject to his releaſe before the time of payment [t].

[s] Com. Dig. Baron & Feme. E. 3. 1 Mod. 179. 1 Sid. 337.

[t] Com. Dig. Baron & Feme. E. 3. 2 Roll. Rep. 134.

Such are the legal conſequences of the unity of huſband and wife; but courts of equity, although they recogniſe the rule of law, which conſiders the huſband and wife as one perſon, yet, in ſome caſes, will treat their intereſts as diſtinct [u]. If property be given generally to the wife, it ſhall veſt in the huſband, both in law and equity; nor

[u] 1 Fonbl. 87. Prec. Chan. 24. 1 Atk. 272.

ſhall it be ſuppoſed to be for her ſeparate uſe, though ſhe live apart from the huſband [w]. But where it is given to the ſeparate uſe of the wife, ſhe ſhall be entitled to it in equity independently of her huſband [x]. And though it were always clear, that ſhe was thus entitled to ſuch property, if truſtees were interpoſed, yet it was formerly a doubt, whether ſhe could take it where none were appointed [y]. It is now, however, ſettled in the affirmative. It has been held, that, where A. deviſed lands in fee to his daughter, a feme covert, for her ſeparate uſe, without naming truſtees, it ſhould be a truſt in the huſband, for it makes no difference, whether the truſt be created by the act of the party, or by the act of the law [z]. So, where a bond was bequeathed to a wife, for her ſole and ſeparate uſe, and no truſtees nominated, it was held to be completely veſted in her in equity [a].

[w] 1 Vern. 261. 2 Vern. 659.

[x] 2 Vef. 452.

[y] 1 Fonbl. 98. 1 P. Wms. 126. 2 P. Wms. 79.

[z] 2 P. Wms. 316. 3 Atk. 399. Com. Dig. Baron & Feme. D. 1.

[a] Bunb. 187.

And equity will not only raiſe a truſt, where the gift is expreſsly for the ſeparate uſe of the wife, but will infer it from words not technical, or from the circumſtances under which the gift is made, or, as it ſeems, merely from the nature of the ſubject; thus, where an eſtate was given to a huſband, for the livelihood of his wife, he was conſidered as a truſtee for her ſeparate uſe [b]. So, where diamonds were given to the wife by the huſband's father, on her marriage, it was held, that they were a gift to her ſeparate uſe, and that ſhe was in equity entitled to them in her own right [c].

[b] 3 Atk. 399.

[c] 3 Atk. 393.

And, where a foreigner made the wife a preſent of trinkets, though not expreſsly for her ſeparate uſe; Lord Hardwicke, C. ſeemed to think they ſhould be ſo conſtrued[e].

[e] 1 Fonbl. 98. 3 Atk. 393.

Gifts, likewiſe, from the huſband to the wife, although the law does not allow the property to paſs, ſhall, without prejudice to creditors, be ſupported in equity, whether truſtees be interpoſed, or not[d]. Thus, where the huſband transferred one thouſand pounds South Sea annuities in the name of his wife, ſhe was held entitled to them, as given to her ſeparate uſe[e]. So, trinkets given to the wife by the huſband, in his life-time, were decided to be her ſeparate eſtate[f]. And, where a huſband allowed his wife to make profit of all butter, poultry, fruit, and other trivial matters ariſing from the farm, beyond what was uſed in the family, out of which ſhe ſaved one hundred pounds, which the huſband borrowed, on his death, the court of chancery allowed the agreement, as a reaſonable encouragement of the wife's frugality, and admitted her to come in as a creditor for that ſum[g]. So, where the huſband agreed that the wife ſhould take two guineas of every tenant, beyond the fine paid to the huſband for the renewal of a leaſe, this was allowed to be the wife's ſeparate money[h]. But, in all ſuch caſes, to entitle the wife to ſuch allowance, there muſt be a ſufficient fund for the payment of debts[i]. Nor will the court, in any caſe, permit a gift of the whole of the huſband's eſtate, while he is living,

[d] 1 Atk. 270.

[e] 1 Atk. 271. 3 Atk. 393.

[f] 3 Atk. 393.

[g] 3 P. Wms. 337.

[h] 3 P. Wms. 339. 1 Fonbl. 95.

[i] 3 P. Wms. 339.

ing, for that would not be in the nature of a mere provision, which is all she is entitled to [i].

[i] 3 Atk. 72.

But, if the husband and wife live together, and he provide her with cloaths and other necessaries, and she demand not, but suffer him to receive the rents and profits of her separate estate, or her pin-money, or if she accept payments short of what she is entitled to on his death, neither she, nor her representatives, shall have an account of such separate estate, farther back than a year, for she shall be presumed to have waived her right to the antecedent produce [k]. Yet, under particular circumstances, it may be otherwise; as where the wife had three hundred pounds *per annum* pin-money, and the husband, for several years before his death, paid her only two hundred, but promised her that she should have the whole at last, she was held entitled to all the arrears [l].

[k] 2 P. Wms. 82. 340. 2 P. Wms. 355. 2 Ves. 7. 190.

[l] 1 Atk. 269. See also 1 Eq. Ca. Abr. 140. pl. 7.

In like manner shall she be entitled to all arrears, if she lived separate from her husband [m].

[m] 3 Atk. 695. 1 Ves. 298.

But, if A. proposing to give a married woman money for her separate use, and, to secure it, give her a note for a certain sum, as received, promising to be accountable, it shall be assets in the hands of the executor of the husband. So, likewise, if a married woman deposit money in A.'s hands, to be kept for her separate use, it shall be considered as part of the husband's estate [n].

[n] Bunb. 188;

SECT. III.

Of the wife's paraphernalia.

THE wife, alſo, may acquire a legal property in certain effects of the huſband at his death, which ſhall ſurvive to her over and above her jointure or dower, and be tranſmiſſible to her perſonal repreſentatives [o].

[o] 2 Bl. Com. 435. 3 Bac. Abr. 65. Off. Ex. Suppl. 61, 62. 11 Vin. Abr. 178.

Such effects are ſtyled paraphernalia; a term, which, in law, imports her bed, and neceſſary apparel, and alſo ſuch ornaments of her perſon as are agreeable to the rank and quality of the huſband [p]. Pearls and jewels, whether uſually worn by the wife [q], or worn only on birth days, or other public occaſions [r], are alſo paraphernalia.

[p] Com. Dig. Baron & Feme F. 3. 1 Roll. Abr. 911. Swinb. part 6. ſ. 7.

[q] Cro. Car. 343.

[r] 3 Atk. 394.

To what amount ſuch claims ſhall prevail is a point which cannot admit of ſpecific regulations. It muſt be left, on the particular circumſtances of the caſe, to the diſcretion of the court [s].

[s] 3 Bac. Abr. 66. Cro. Car. 343.

In the reign of queen Elizabeth, jewels, to the value of five hundred marks, were allowed, in the caſe of the wife of a viſcount [t]. A diamond chain, of the value of three hundred and ſeventy pounds, where the lady was the daughter of an earl, and wife of the king's ſerjeant at law, in the reign of Charles the firſt, was conſidered as reaſonable [u].

[t] 2 Leon. 166. Moore 213.

[u] Cro. Car. 343. Jon. 332. Roll. Abr. 911. 11 Vin Abr. 179. S. C.

Jewels

Jewels and plate, bought with the wife's pin-money, to the amount of five hundred pounds, which bore a small proportion to the husband's estate, were regarded in the same light [w]: And Lord Hardwicke, C. held the widow of a private gentleman to be entitled to jewels worth three thousand pounds, as her paraphernalia, and that the value made no difference in the court of chancery [x]. By the custom of London, a citizen's widow may retain some of her jewels as paraphernalia, but not all [y].

[w] Prec Chan. 27.

[x] 2 Atk. 77.

[y] 11 Vin. Abr. 180. Nelf. Chan. Rep. 179.

If the husband deliver cloth to the wife for her apparel, and die before it be made, she shall have the cloth, as of this species of property [z]. If the husband present his wife with jewels, for the express purpose of wearing them, they shall be esteemed merely as paraphernalia, for, if they were considered as a gift to her separate use, she might dispose of them absolutely, and so defeat his intention [a].

[z] 1 Roll. Abr. 911.

[a] 3 Atk. 398.

The husband, if inclined to so unhandsome an exercise of his power, may sell or give away, in his life-time, such ornaments and jewels of the wife, but he cannot dispose of them by will [b]. In case of a deficiency of assets for payment of debts, the widow shall not be entitled to such paraphernalia [c], not, even, if they were presents made to her by the husband before marriage [d]; nor shall she be so entitled where there are not assets at the

[b] 2 Bl. Com. 436. 3 Atk. 394.

[c] 1 P. Wms. 730. 3 Atk. 369. Moore 216. 3 Bro. P C. 187.

[d] 2 Atk. 104.

time of the husband's death, although contingent assets should afterwards fall in [c].

[c] 2 P. Wms. 80.

But, such ornaments, though subject to the debts, shall be preferred to the legacies of the husband, and the general rules of marshalling assets, (which will be treated of hereafter,) are applicable in giving effect to such priority [f].

[f] 2 P. Wms. 80. not. 1. 1 P. Wms. 729. 2 P. Wms 542. 2 Vef. 7.

If the husband pawn his wife's paraphernalia, and die, leaving a fund sufficient to pay all his debts, and to redeem the pledges, she is entitled to have them redeemed out of the personal estate [g]. So, where a husband pledged a diamond necklace of the wife, as a collateral security for money borrowed on a bond, and authorised the pawnee to sell it, during his absence, at a sum specified, it was held, that this amounted not to an alienation, if it were not sold in his life-time, and that it was redeemable for his widow [h].

[g] 3 Atk. 395.

[h] 3 Atk. 393.

If a woman, by marriage articles, agree to claim such part only of the effects of the husband as he shall give her by his will, she is excluded from her paraphernalia [i]. But her necessary apparel shall, in all cases, be protected, as decency and humanity require, even against the claims of creditors [k].

[i] 3 Bac. Abr. 66. Com. Dig. Baron & Feme. F. 3. 2 Vern. 49. 83.

[k] 2 Bl. Com. 436. 2 Roll. Abr. 911.

If the husband bequeath to the widow her jewels, for her life, and then over, and she make no election to have them as her paraphernalia, her executor shall have no title to demand them [l].

[l] 2 Vern. 246.

CHAP.

CHAP. VI.

OF THE INTEREST OF A DONEE MORTIS CAUSA.

ANOTHER ſpecies of intereſt in the perſonal property of the deceaſed remains to be conſidered. Such as veſts neither in his executor, nor his heir, nor his widow, in thoſe reſpective characters. It is created by a gift under the following circumſtances. When in his laſt illneſs, and apprehenſive of the approach of death, he delivers, or cauſes to be delivered to a party, the poſſeſſion of any of his perſonal effects to keep in the event of his deceaſe. Such gift is therefore called a *donatio cauſâ mortis*. It is accompanied with the implied truſt, that, if the donor live, the property ſhall revert to him, ſince it is given only in contemplation of death [a].

[a] 2 Bl. Com. 514. 11 Vin. Abr. 176. Prec. in Chan. 269.

To ſubſtantiate the gift, there muſt be an actual tradition or delivery of the thing. The poſſeſſion of it muſt be transferred in point of fact. The purſe, the ring, the jewel, or the watch, muſt be given into the hands of the donee, either by the donor himſelf or by his order [b]. But there are caſes, in which the nature of the ſubject will not admit of a corporeal delivery; and then if the party goes as far as he can towards transferring the poſſeſſion, his bounty ſhall prevail. Thus, a ſhip has been held to be delivered, by the delivery of a bill of ſale defeaſible on the donor's recovery. And

[b] 2 Vef. 431. 2 Veſ. jun. 111 1 P. Wms. 404. 441.

in a recent case, the Lord Chancellor seemed to be of opinion, that such donation might be effected by deed or writing [c].

[c] 2 Ves. jun. 120.

The delivery also of the key of a warehouse, in which goods of bulk were deposited, has been determined to be a valid delivery of the goods for such a purpose [d]. So the delivery of the key of a trunk, has been decided to amount to a delivery of the trunk, and its contents [e]. Nor in those instances were the key and bill of sale considered in the light of symbols, but as modes of attaining the possession and enjoyment of the property [f]. So a bond given in prospect of death, although a *chose* in action, is a good donation *mortis causâ*, for a property is conveyed by the delivery [g]. Such, likewise, have been the decisions in regard to bank notes [h]. In all these cases, the donor delivers as complete a possession as the subject matter will permit.

[d] 2 Ves. 434.

[e] Prec. in Chan. 300. 2 Ves. 441. Vid. also 2 Ves. jun. 116.

[f] 2 Ves. 443.

[g] 3 Atk. 214. 2 Ves 441. 4 Bro. Ch. Rep. 72.

[h] 1 P. Wms. 404. 3 P. Wms. 356. 2 Bro. Ch. Rep. 612.

But bills of exchange, promissory notes, and checks on bankers, seem incapable of being the objects of such donation [i]. The delivery of these instruments is distinguishable from that of a bond, which is a specialty, and itself the foundation of the action, the destruction of which destroys the demand; whereas the bills and notes are only evidence of the contract [k].

[i] 3 P. Wms. 350. 2 Ves 442. 4 Bro. Ch. Rep. 291.

[k] 2 Ves. 442.

Nor shall a delivery merely symbolical have such operation. As, where, on a deed of gift not to take

take place till after the grantor's death, a ſixpence was delivered by way of putting the grantee in poſſeſſion; the eccleſiaſtical court held ſuch delivery to be inſufficient for the purpoſe, and pronounced for the inſtrument as a will [l]. So it was determined in chancery, that the delivery of receipts for South Sea annuities was in like manner ineffectual, and that, to make it complete, there ought to have been a transfer of the ſtock [m]. Leaſt of all ſhall ſuch donation be effectuated by parol, as, merely ſaying, "I give," without any act to transfer the property [n]. Nor ſhall a preſent abſolute gift be conſidered as of this denomination. To bring it within the claſs, it muſt be made to take effect only on the death of the donor [o]. Therefore, the gift of a check on a banker, "Pay to ſelf or bearer two hundred pounds," and alſo of a promiſſory note, being abſolute and immediate, was held clearly on that ground to be no *donatio mortis cauſâ* [p]. But where the donor gave a bill on his banker, with an indorſement, expreſſing that it was for the donee's mourning, and giving directions reſpecting it, the bill was decided to be an appointment in the nature of ſuch donation, ſince it was for a purpoſe neceſſarily ſuppoſing death [q].

[l] 2 Veſ. 440.

[m] 2 Veſ. 431.

[n] 2 Veſ. 444.

[o] 2 Veſ. jun. 120.

[o] 2 Veſ. jun. 120.

[p] 2 Veſ. jun. 111. 4 Bro. C. Rep. 286. S. C.

[q] 1 P. Wms. 441. et vid. 2 Veſ. jun. 111.

Simple contract debts, and arrears of rent, are incapable of this ſpecies of diſpoſition, becauſe there can be no delivery of them [r].

[r] 2 Veſ. 436. 442.

Whether

Whether the delivery of a mortgage deed will amount to such gift of the money due on the security, is an undecided point [s].

[s] Vid. 3 P. Wms. 358. in not. 2 Ves. 436. Ambl. 318.

If the donor die, the interest of the donee is completely vested; nor is it necessary that the gift should be proved as part of the will [t]; nor is the executor's assent to it requisite, as in the case of a legacy [u]. But the gift, however regularly made, shall not prevail against creditors [w].

[t] 11 Vin. Abr. 178. 1 P. Wms. 441. 3 P. Wms. 357.

[u] 2 Bl. Com. 514. 2 Ves. jun. 120.

[w] 2 Bl. Com. 514. 2 Ves. jun. 120.

Such is the interest which the executor, the heir, the successor, the devisee, the remainder-man, the widow, and the donee *mortis causâ* of the testator, respectively take in the personal effects.

CHAP.

CHAP. VII.

HOW EFFECTS WHICH AN EXECUTOR TAKES IN THAT CHARACTER MAY BECOME HIS OWN.

THE property which an executor takes in his repreſentative capacity may, in certain inſtances, be converted into his own. As, firſt, in regard to the ready money left by the teſtator. On its coming into the hands of the executor, the property in the ſpecific coin muſt of neceſſity be altered; for when it is intermixed with the executor's own money, it is incapable of being diſtinguiſhed from it, although he ſhall be accountable for its value; and therefore a creditor of the teſtator cannot by *fieri facias* on a judgment recovered againſt the executor, take ſuch money as *de bonis teſtatoris* in execution [a]. So, if the teſtator died indebted to the executor, or the executor not having ready money of the teſtator, or for any other good reaſon, ſhall pay a debt of the teſtator's with his own money, he may elect to take any ſpecific chattel as a compenſation; and if it be not more than adequate, the chattel by ſuch election ſhall become his own [b].

[a] Off. Ex. 89.

[b] Off. Ex. 89. Dy. 187. b. Plowd. 185.

But if the debt due to him from the teſtator amount to the full value of all his effects in the executor's hands, there is a complete tranſmutation

3. of

of the property in favour of the executor, by the mere act, and operation of law: in the former case, his election, and in the latter, the mere operation of law, shall be equivalent to a judgment and execution, for he is incapable of suing himself [c].

[c] Plowd. 185.

So, in the case of a lease of the testator devolved on the executor, such profits only as exceed the yearly value shall, as it has been already stated, be held to be assets: it therefore follows, that if the executor pay the rent out of his own purse, the profits to the same amount shall be his [d]. There are likewise other means of thus changing the property. As, if the testator's goods be sold under a *fieri facias*, the executor, as well as any other person, may buy such goods of the sheriff; and in case he does so, the property, which was vested in him as executor, shall be turned into a property in *jure proprio* [e].

[d] Off. Ex. 90, 91.

[e] Off. Ex. 91.

If the executor among the testator's goods find, and take some, which were not his, and the owner recover damages for them in an action of trespass or trover, in this, as in all similar cases, the goods shall become the trespasser's property, because he has paid for them [f].

[f] Off. Ex. 92.

CHAP.

CHAP. VIII.

OF THE INTEREST OF AN ADMINISTRATOR, GENERAL AND SPECIAL--OF A MARRIED WOMAN, EXECUTRIX OR ADMINISTRATRIX—OF SEVERAL EXECUTORS OR ADMINISTRATORS—OF THE EXECUTOR OF AN EXECUTOR—OF AN ADMINISTRATOR DE BONIS NON—*OF AN EXECUTOR* DE SON TORT.

AS an adminiſtrator has the office and quality of an executor, the intereſt of the one in the property of the deceaſed, is in all reſpects the ſame as that of the other [a]. The intereſt of ſpecial or limited adminiſtrators is, alſo, during its continuance, the ſame as that of an executor [b]; but they are not inveſted, as will be ſhewn in its proper place, with the ſame powers and authority as belong to him [c].

[a] Off. Ex. 159. Off. Ex. Suppl. 43. 5 Co. 83. 1 P. Wms. 43.

[b] 2 Fonbl. 387.

[c] 11 Vin. Abr. 104, 105. 3 Bac. Abr. 13, 14.

If a married woman be executrix, or adminiſtratrix, the huſband has a joint intereſt with her in the effects of the deceaſed; ſuch as devolves the whole adminiſtration upon him, and enables him to act in it to all purpoſes, with or without her aſſent [d]. Therefore it is held, that he may ſurrender or diſpoſe of a term, which was veſted in her in that capacity, and ſuch ſurrender, or diſpoſition, ſhall be binding upon her [e]. So, a gift or releaſe of any part of the deceaſed's perſonal property by the huſband alone, ſhall

[d] Ld. Raym. 369. Com. Dig. Admon. D. 1 Salk. 306. Off. Ex. 199. 4 Term Rep. 617.

[e] Bl. Rep. 801.

shall be equally available [f]; but the wife has no right to administer without the husband; and such acts, as have been just mentioned, if performed by her without his concurrence, will be of no validity [g]. In case of the husband's death, the interest, never having been divested, shall survive to her; but if she die, it shall not survive to the husband, inasmuch as it belonged to him merely in her right, as representative of the deceased [h]. And although, generally speaking, a feme covert cannot make a will without the assent of her husband, yet without his assent she may make a will, and continue the executorship in respect to the property thus vested in her in *auter droit* [i]. Hence, if the wife of A. have debts due to her in her own right, and is also executrix to B., and make a will without her husband's assent, appointing an executor, the will in respect to the goods and credits which belonged to her as the executrix of B., shall be valid, and her executor may prove it in opposition to the husband. But as to the debts due to her in her private capacity, the will shall be void, and the husband may take administration: she shall be considered as dying testate in regard to the property of which she was possessed as executrix, and as intestate in regard to that to which she was entitled in her own right [k].

[f] Salk. 117. Off. Ex. 208.

[g] Salk. 306. Off. Ex. 207, 208. Com. Dig. Admon. D. vid. supra 64.

[h] Off. Ex. 208. Com.. Dig. Baron & Feme. F. 1. Dy. 331.

[i] 2 Bl. Com. 408. Off. Ex. 199. 3 Bac. Abr. 10. Off. Ex. Suppl. 20.

[k] Off. Ex. 202.

If there be several executors, or administrators, they are regarded in the light of an individual person. They have a joint and entire interest in the testator's effects, which is incapable of being divided;

vided [l]; and, in case of death, such interest shall vest in the survivor [m].

[l] Com. Dig. Admon. B. 12. Dy. 23. b. 3 Bac. Abr. 39.

[m] 9 Co. 36. Dy. 160. vid. supra 16.

So also an executor of an executor, in however remote a series, has the same interest in the goods of the first testator, as the first and immediate executor [n].

[n] Com. Dig. Admon. G. Off. Ex. 259. 11 Vin. Abr. 420. 4 Burn Eccl. L. 273.

An administrator *de bonis non*, has also the same interest in such of the effects as remain unadministered, as was vested in the executor, or antecedent administrator.

An executor *de son tort* has no interest whatever in the property, and therefore can maintain no action in right of the deceased [o].

[o] 11 Vin. Abr. 215. 12 Mod. 471, 472. 2 Bl. Com. 507.

But if the executor *de son tort* take out administration, it shall to most purposes qualify the wrong, and vest the same interest in him as in other administrators, and consequently such as shall have relation to the time of the intestate's death [p].

[p] 11 Vin. Abr. 214—217. 12 Mod. 471, 472. Moore 126. 2 Ventr. 179. 3 Bac. Abr. 25, 26. 3 Term Rep. 590. 2 H. Bl. 26.

BOOK III.

OF THE POWERS AND DUTIES OF EXECUTORS, AND ADMINISTRATORS.

CHAP. I.

OF THE FUNERAL—OF MAKING AN INVENTORY—OF COLLECTING THE EFFECTS.

SECT. I.

Of the funeral.

THE ſubject now leads me to conſider the powers and duties of an executor, or adminiſtrator [a].

[a] 8 Co. 136.

And, firſt, he is to bury the deceaſed according to his rank and circumſtances [b]. It has been already ſtated, that an executor, before probate, may perform this pious office [c]; and that the performance of it by a ſtranger ſhall not conſtitute him an executor *de ſon tort* [d]. The expences attending it ſhall be allowed in preference to all debts, and charges [e]; but the executor is not juſtified in incurring ſuch as are extravagant [f]. Nor as againſt creditors ſhall he be warranted in more than are abſolutely neceſſary. In ſtrictneſs, no funeral expences are allowed in the caſe of an inſolvent eſtate,

[b] Prec. Chan. 27. Com. Dig. Admon. C.

[c] Supr. 24.

[d] Supr. 19.

[e] 11 Vin. Abr. 432. Br. tit. Executor, pl. 172. Dr. & Stud. Dial. 2. c. 10.

[f] 2 Bl. Com. 508.

except for the coffin, shroud, and ringing the bell; the fees of the parson, clerk, sexton, and bearers; but not for the pall, or ornaments [g]. Still less shall charges for feasts and entertainments be admitted; and indeed in any case they seem incongruous to so mournful an occasion [h]. If the executor neglect the observance of these rules, he will be chargeable with a species of devastation or waste of the testator's property, which shall be prejudicial only to himself, and not to the creditors or legatees [i].

[g] Salk. 296. L. of Ni. Pr. 143. 4 Burn Eccl. L. 301. Off. Ex. 174. 3 Atk. 249. 3 Bac. Abr. 85.

[h] Off. Ex. 131.

[i] 2 Bl. Com. 508. Godolph. p. 2. c. 26. f. 2.

The executor must also prove the will, or in case of intestacy, the next of kin must take out administration within the six months limited by the statute, provided they respectively act [k].

[k] Vid. supra 22. 68.

SECT. II.

Of the making of an inventory by the executor or administrator.

AN executor, or administrator, before he administers, except by the performance of such acts as cannot be deferred, as disposing of perishable articles [a], is likewise bound, pursuant to the stat. 21 *Hen.* 8. *c.* 5. passed in affirmance of the ecclesiastical law, to make an inventory of the deceased's personal estate and effects, in the presence of at least two of his creditors, or legatees, or next of kin; and in their default, or absence, of two other

[a] 4 Burn Eccl. L. 250.

other honeſt perſons; and the ſame ſhall cauſe to be indented, of which one part ſhall be delivered in to the ordinary upon oath, and the other part ſhall remain in the poſſeſſion of ſuch executor or adminiſtrator. And the ordinary ſhall not, under the penalty of ten pounds, refuſe to take ſuch inventory, when ſo preſented to him [b]. Alſo, by the ſtat. 22 & 23 *Car.* 2. *c.* 10. as hath been before mentioned [c], an adminiſtrator muſt enter into a bond, with two or more ſureties, conditioned, among other things, for his exhibiting into the regiſtry of the court, at or before a day ſpecified, a true and perfect inventory of the goods, chattels, and credits of the deceaſed come to his poſſeſſion [d].

[b] 3 Bac. Abr. 45. 4 Burn Eccl. L. 251.

[c] Supr, 69.

[d] 3 Bac. Abr. 46. 11 Vin. Abr. 358.

An inventory is thus required for the benefit of creditors and legatees, or parties in diſtribution [e]. It is to contain a full, true, and perfect deſcription and eſtimate of all the chattels, real and perſonal, in poſſeſſion, and in action, to which the executor or adminiſtrator is entitled in that character, as diſtinguiſhed from the heir, the widow, and the donee *mortis cauſâ* of the teſtator or inteſtate [f]. It muſt alſo diſtinguiſh ſuch debts as are ſperate, and thoſe which are doubtful, or deſperate [g]. By the executor, it muſt be exhibited within a competent time: what ſhall be ſo conſidered, depends on the diſcretion of the ordinary, regulated by the diſtance at which the goods lie from the reſidence of the executor, and other circumſtances [h]. An adminiſtrator is bound, purſuant to the ſtat. of *Car.* 2. to exhibit his inventory before the ordinary by the

[e] 3 Bac. Abr. 45. Swinb. p. 6. ſ. 6.

[f] 2 Bl. Com. 510. 3 Bac. Abr. 47. 4 Burn Eccl. L. 253, 254.

[g] 4 Burn Eccl. L. 254. 3 Bac. Abr. 47. L. of Ni. Pr. 140.

[h] 3 Bac. Abr. 47. Swinb. p. 6. ſ. 8. 4 Burn Eccl. L. 265.

time ſpecified in the condition of the bond, and muſt do ſo at his peril [i].

[i] 3 Bac. Abr. 47. Salk. 251.

And the judge has authority to cite or ſummon either of them for ſuch a purpoſe, not only at the ſuit of a party, but at his own diſcretion [k].

[k] Com. Dig. Admon. B. 7. 4 Burn Eccl. L. 250. 265. Sed vid. 5 Mod. 247.

In point of law, nevertheleſs, it is the duty, both of an executor and an adminiſtrator, of their own accord [l], to exhibit an inventory; the former, within a reaſonable time, the latter, at the time limited by the condition of the adminiſtration-bond. And the courts formerly conſidered the neglect of this duty in a light unfavourable to the party, eſpecially where there was a deficiency of aſſets; and although not concluſive againſt him, yet as expoſing him to imputation; and that the omiſſion was the leſs to be excuſed, ſince neither at law nor in equity is the inventory final; it is permitted him to ſhow that the aſſets come to his hands amount, from unforeſeen circumſtances, to leſs than he may have originally ſtated them [m]. But although ſuch be the legal obligation impoſed on an executor or adminiſtrator, in every caſe, to produce an inventory, yet the practice of the ſpiritual court ſeems in this point to have been gradually relaxing: at one period, it appears to have been uſual for the executor or adminiſtrator, after probate or adminiſtration, to exhibit an inventory, which was conſidered as authenticated by the general oath he had taken for the due execution of the will, or adminiſtration of the effects, and for exhibiting a true inventory.

[l] Stat. 21 Hen. 8. c 5. Salk. 251.

[m] 4 Burn Eccl. L. 252. 2 Veſ. 193.

Yet

Yet then he was liable to be called upon to exhibit a farther inventory on his ſpecial oath, at the ſuit of a party intereſted [n]. But according to the practice which at preſent prevails, neither the executor nor adminiſtrator, in general caſes, exhibits any inventory whatſoever, unleſs he be cited for that purpoſe in the ſpiritual court, at the ſuit of a creditor, or legatee, or party in diſtribution [o]; and in that caſe, his former general oath will not be ſufficient; but the inventory thus exhibited, muſt be verified by a ſpecial oath, either perſonally, or by virtue of a commiſſion [p].

[n] 4 Burn Eccl. L. 250. 265, 266. 1 Ought. 344.

[o] Ex relat.

[p] 4 Burn Eccl. L. 266.

It is, however, the part of a prudent perſon who ſuſtains this office, in every caſe to ſee that the effects are carefully appraiſed, and reduced into an inventory, not only becauſe he may be cited hereafter to produce it, but alſo, becauſe a diſtinct and accurate knowledge of the fund is neceſſary, as will more clearly appear from the ſequel of this work, to direct him in the ſafe execution of the truſt. Indeed, if a party adminiſter without making an inventory, the law will ſuppoſe him to have aſſets for the payment of all the debts and legacies, unleſs he rebut the preſumption; whereas, if he make an inventory, he ſhall not be preſumed to have more effects of the deceaſed than are compriſed within it; and the proof of any omiſſion is then thrown on the oppoſite party [q].

[q] 4 Burn Eccl. L. 265, 266.

But it is not neceſſary, according to the modern practice, that the appraiſement and inventory

ſhould be made exactly purſuant to the letter of the ſtatute. If the effects appear to have been appraiſed fairly, and by perſons of repute, and reduced into an inventory, ſuch inventory ſhall obtain credence, unleſs it be falſified by the adverſe party [r]. And an inventory may be diſpenſed with altogether, if it ſhall appear clearly to the court to be unneceſſary [s]. As, where A. died poſſeſſed of a large perſonal eſtate, and appointed his eldeſt ſon executor; and among other bequeſts, gave his ſecond ſon two thouſand pounds, to be paid at three ſeveral payments: The ſecond ſon cited his elder brother before the judge of the prerogative court where the will was proved, in order to compel him to bring in an inventory: But it appearing that the two firſt payments had been made, and the third had been tendered, the judge decided, that there was no need of an inventory at the inſtance of the plaintiff; and the ſentence was affirmed by the delegates, firſt on appeal, and afterwards on a commiſſion of review [t].

[r] 4 Burn Eccl. L. 265.

[s] 4 Burn Eccl. L. 265.

[t] Rzym. 470.

On the other hand, the judge will, in ſpecial caſes, at the inſtance of a party intereſted, decree an inventory to be exhibited by the executor or adminiſtrator, before the iſſuing of the probate, or letters of adminiſtration, under ſeal; and ſuch inventory muſt alſo be ſubſtantiated by a ſpecial oath [u]. Alſo, under particular circumſtances, before the granting of the probate, or letters of adminiſtration, the court will, on the petition of a party intereſted, inſtead of requiring ſuch inven-

[u] 4 Burn Eccl. L. 266.

tory, iſſue a commiſſion for the appraiſement, and valuation of the goods, rights, and credits, and inſpection of the bonds, leaſes, and other writings, relative to the perſonal eſtate of the deceaſed, at his houſe, or elſewhere, on a day ſpecified, with ſuch continuation of time and place as may be neceſſary [w].

[w] 4 Burn Eccl. L. 266.

In caſes of this nature, there alſo uſually iſſues a monition to the other party in ſpecial, and to all others in general, with whom any of ſuch effects of the deceaſed remain, requiring them to exhibit the ſame to the appraiſers under ſuch commiſſion, at the time and place appointed for its execution, in order that they may be appraiſed, and inſerted in the inventory [x].

[x] 4 Burn Eccl. L. 266.

And on ſuch commiſſion being duly executed, the inventory ſhall be brought in, and exhibited, ſigned by the hands of the appraiſers, or two of them at the leaſt, but without the oath of the party [y].

[y] 4 Burn Eccl. L. 267.

In ſuch caſe, alſo, an inventory is often required on the executor's or adminiſtrator's oath, of ſuch goods of the deceaſed as have been already diſpoſed of [z]. But after an inventory is exhibited, a creditor cannot impeach it in the eccleſiaſtical court; for the ſtat. 21 *Hen.* 8. which requires an executor or adminiſtrator to make an inventory, enjoins him only to deliver it on oath into the keeping of the

[z] 4 Burn Eccl. L. 267.

ordinary; and the ordinary is bound to receive the same on its being so presented [a].

[a] 4 Burn Eccl. L. 267. Burr 1922. 8 Mod. 168. 2 Fonbl. 418. not. (d).

Yet a creditor may state objections to the inventory, which the party is bound to answer upon oath; but no evidence is admissible to contradict the answer. If the creditor be still dissatisfied, he may have recourse to equity for more effectual relief [b].

[b] 2 Fonbl. 418. not. (d).

SECT. III.

Of his collecting the effects.

THE next duty of the executor or administrator is to collect all the goods and chattels so inventoried. For that purpose, the law invests him with large powers and authority. As representative of deceased, we have seen, he has the same property in the effects as the principal had when living; he has also the same remedies to recover them [a]. Within a convenient time after the testator's death, or the grant of administration, he has a right to enter the house descended to the heir, in order to remove the goods [b], provided he do so without violence; as, if the door be open, or at least the key be in the door; and, although the door of entrance into the hall and parlour be open, he cannot therefore justify forcing the door of any chamber to

[a] 2 Bl. Com. 510. Hargr. Co. Litt. 209.

[b] Vid. supr. 24.

to take the goods contained in it; but is empowered to take thoſe only, which are in ſuch rooms as are unlocked, or in the door of which he ſhall find the key. He has, alſo, a right to take deeds and other writings, relative to the perſonal eſtate, out of a cheſt in the houſe, if it be unlocked, or the key be in it; but he has no right to break open even a cheſt. If he cannot take poſſeſſion of the effects without force, he muſt deſiſt, and reſort to his action [c]. On the other hand, if the executor or adminiſtrator, on his part be remiſs in removing the goods within a reaſonable time, the heir may diſtrain them as damage feaſant [d].

[c] Off. Ex. 92, 93. 11 Vin. Abr. 267.

[d] Off. Ex. 93. Plowd. 280, 281.

The executor has alſo a right, on producing the probate at the bank, and cauſing ſo much of it as relates to the teſtator's intereſts in the ſeveral ſtocks to be entered in the proper offices, according to the acts of parliament which regulate this ſpecies of property, to have the ſame transferred from the teſtator's name into his own, or to ſuch perſon as he ſhall appoint; and even in the caſe of a ſpecific bequeſt of ſtock, the executor is entitled to call upon the bank for a transfer; and on their refuſal, they are ſubject to an action at his ſuit. It is perſonal property, and ſubject to all its incidents [e]. The adminiſtrator has the ſame right on producing the letters of adminiſtration.

Vid. ſtat. 5 W. & M. c. 20.

[e] The Bank of England v. Moſſet. 3 Bro. Ch. Rep. 260. Vid. alſo Dougl. 524.

The executor or adminiſtrator has likewiſe authority to ſell or diſpoſe of the deceaſed's effects, and

and convert them into ready money, to anſwer the purpoſes of the truſt [f].

[f] 2 Bl. Com. 510. 11 Vin. Abr. 270. 2 Vern. 445.

He is entitled to recover by action, or other legal remedies, or by ſuit in equity, whatever pertains to ſuch perſonal eſtate [g].

[g] Vid ſupr. 120.

He is alſo empowered to redeem ſuch chattels as the deceaſed may have left in pledge [h].

[h] Vid ſupr. 126.

CHAP.

CHAP. II.

OF HIS PAYMENT OF DEBTS IN THEIR LEGAL ORDER.

SECT. I.

Of debts due to the crown by record, or ſpecialty—Of certain debts by particular ſtatutes.

THE diſpoſition of the property when thus collected, and which conſtitutes aſſets, is next to be diſcuſſed. And, firſt, I ſhall treat of the application of the aſſets in the order preſcribed by law. He muſt, in the firſt place, pay all funeral charges, and the expences of proving the will, or of taking out letters of adminiſtration [a]. Secondly, he muſt pay the debts of the deceaſed, and in ſuch payment he muſt be careful to obſerve the rules of priority; for, if he pay thoſe of a lower degree firſt, on a deficiency of aſſets, he muſt anſwer thoſe of a higher out of his own eſtate [b]. The more clearly to trace the order which the law preſcribes for the payment of debts, and which the executor or adminiſtrator is thus bound at his peril to obſerve, it is neceſſary to conſider them under a variety of claſſes.

[a] 2 Bl. Com. 511. Off. Ex. 130, 131.

[b] 2 Bl. Com. 511.

They are diſtinguiſhed, then, firſt, into debts due to the crown, by record, or ſpecialty: ſecondly, Certain debts created by particular ſtatutes: thirdly,

Debts

Debts of record in general: fourthly, Debts due by ſpecialty: fifthly, Debts due by ſimple contract; firſt, to the king; and ſecondly, to a ſubject.

To all other debts of whatever nature, as well of a prior as of a ſubſequent date, ſuch as are due to the crown, by record or ſpecialty, claim the precedence [c].

[c] 11 Vin. Abr. 295. 3 Bac. Abr. 79. Off. Ex. 133. 1 ro Eliz. 793. Com. Dig. Admon. C. 2. 1 Salk. 80.

Debts ſecured to the king by ſpecialty, are of the ſame degree with thoſe of record: for by the ſtat. 33 *H.* 8. *c.* 39. it is enacted, that all obligations, and ſpecialties, taken to the uſe of the king, ſhall be of the ſame nature as a ſtatute-ſtaple [d]. The king, by his prerogative, is to be preferred before other creditors, inaſmuch as the law regards the royal revenue as of more importance than any private intereſt [e]. Therefore, an executor, whoſe teſtator was indebted by matter of record to the king, may plead to an action brought by a judgment creditor, or any other creditor, that the teſtator died thus indebted to the crown, and hath not left aſſets more than to ſatisfy the ſame, and ſuch plea ſhall be valid; but the defendant muſt ſhew the record in certain [f]. So if the creditor proceed to ſue out execution on a ſtatute-merchant, or ſtaple, the executor on ſetting forth this matter, will be relieved on an *audita querela* [g]. But the debts due to the crown, which are ſo privileged, muſt be ſuch as are due by matter of record, or by ſpecialty, which, as we have juſt ſeen, are of the ſame nature [h]. And, therefore, ſums of money owing to the

[d] Off. Ex. 134.

[e] 3 Bac. Abr. 79. Off. Ex. 133.

[f] Off. Ex. 134. Com. Dig. Admon. C. 2.

[g] 3 Bac. Abr. 79. Off. Ex. 135.

[h] 3 Bac. Abr. 79. Off. Ex. 133, 134.

the king on wood ſales, ſales of tin, or of other his minerals, for which no ſpecialty is given, ſhall not be preferred to a debt due to a ſubject by matter of record. Hence, though fines, and amercements in the king's courts of record are clearly debts of record, and entitled to ſuch preference, yet amercements in the king's courts baron [h], or courts of his honours, which are not of record, have no ſuch priority; nor have fines for copyhold eſtates, nor money ariſing from the ſale of eſtrays within his manors, or liberties: for theſe are not debts of record. So, whatever accrues to the king by attainder, or outlawry, is conſidered as a debt by ſimple contract before office found; and, although debts due to the perſon outlawed, or attainted, be by obligation, or other ſpecialty, and the outlawry or attainder be of record, yet the law does not recogniſe the king's title before office found: for, till then, it does not appear by record that any ſuch debt was due to the party [i].

[h] 3 Bl. Com. 25.

[i] 3 Bac. Abr. 80. Off. Ex. 134. Com. Dig. Admon. C. 2

So, if the king's debtor by ſimple contract, be outlawed on meſne proceſs, the debt is not altered in its nature, nor ſhall it have precedence, as if the outlawry be ſubſequent to the judgment, and the debt therefore of record [k]. Nor does the prerogative extend to a debt aſſigned to the king. Therefore it was held, where the obligee of a bond, after the death of the obligor, aſſigned it to the king, that the obligor's executors were warranted in ſatisfying a judgment recovered againſt him in his life-time in preference to the bond [l]. So, alſo, the arrears

[k] Com. Dig. Admon. C. 2. 1 Salk. 80. 11 Vin. Abr. 291.

[l] 1 Com. Dig. Admon. C. 2. 11 Vin. Abr. 301 Lane 65.

arrears of rent due to the crown, whether it be a fee-farm rent, or a rent reſerved on a leaſe for years, ſhall, it ſeems, be regarded in the light of a debt by ſimple contract [m].

[m] 3 Bac. Abr. 80. Off. Ex. 135.

Such is the law in regard to debts due to the crown, by record, or ſpecialty.

Next, in order, are certain ſpecific debts, which, ſubſequent to thoſe of which I have been treating, are, by particular ſtatutes, to be preferred to all others, as, forfeitures for not burying in woollen, by 30 *Car.* 2. *c.* 3.: money due for letters to the poſt office, by 9 *Ann. c.* 10.: and money due from the overſeers of the poor, by 17 *Geo.* 2. *c.* 38. [n].

[n] 3 Bac. Abr. 80. in not. 2 Bl. Com. 511. 4 Burn Eccl. L. 301.

SECT. II.

Of debts of record in general.—Of judgments: and herein of decrees.—Of ſtatutes, and recognizances. —Of docquetting judgments.

TO theſe ſucceed debts of record in general, of which there are two claſſes: firſt, judgments in courts of record: and, ſecondly, ſtatutes and recognizances. The former are of a higher nature, and of a greater dignity, than the latter; for

for judgments are recovered on judicial proceedings in litigated cafes, and in a regular courfe of juftice; and the records of fuch judgments are entered on publick rolls, entrufted to the cuftody of a fworn officer; alfo judgments confeffed by the teftator, are on the fame footing; for, though, in point of fact, they were voluntarily acknowledged, yet they, as well as other judgments, are prefumed to have been given adverfely, the law fuppofes, *quòd judicium redditur in invitum*[a].

[a] 3 Bac. Abr. 80. Off. Ex. 136. 139. Com. Dig. Admon. C. 2. Roll. Abr. 9 6. Cro. Eliz. 793.

Hence judgments, as well fuch as were recovered againft the teftator, as thofe which were confeffed by him, are in a precedent degree to ftatutes and recognizances; for ftatutes and recognizances, (of the nature of which I fhall more fully fpeak,) are entered into by the confent of the parties; the former, and, till enrolment, the latter, are carried in pockets, or depofited in efcritoirs, in fhort, are in the private keeping of the creditor himfelf. Nor does priority of date make any difference in favour of fuch laft mentioned fecurities[b]. An executor is obliged to difcharge a later judgment, in preference to a ftatute or recognizance, prior in point of time[c].

[b] 4 Co. 60. 5 Co. 28. Off. Ex. 137. Hob. 195. 11 Vin. Abr. 292. in not. 299. 2 Bl. Com. 160. 341.

[c] Off. Ex. 137. Com. Dig. Admon. C. 2. 4 Co. 59, 60.

Such is the preference to which judgments, as diftinguifhed from the more private records, are entitled. Nor is this privilege confined to judgments in the courts of Weftminfter-hall, but extends itfelf to judgments in all other courts of record; that is to fay, courts in cities, or towns corporate,

corporate, having power, by charter or prescription, to hold plea of debt above forty shillings, as, in London, Oxford, and other places: for, although, in the first instance, such goods only can be taken in execution on those judgments as lie within the jurisdiction of those respective courts; yet, formerly, if the record were removed into the chancery, by *certiorari*, and thence, by mittimus, into one of the superior courts of law, execution might have been had upon the defendant's goods in any county in England [d]; and, now, by the stat. 19 *Geo.* 3. *c.* 70., any of his majesty's courts of record at Westminster, may, on a proper application, cause the records of such judgments to be removed thither, and may issue writs of execution against the persons or effects of the defendants, in the same manner as on judgments obtained in those superior courts. So, a judgment in a *pie poudre* court, which is a court of record, incident to every fair and market, and is the lowest court of justice [e], known to the law of England, claims the same preference [f]; and, by the above statute, its process, after judgment, shall be aided in the same manner. Nor does the priority of a judgment, in any degree, depend on the original cause of action; a judgment against the testator on a debt by simple contract, is of the same nature as a judgment on a specialty [g]. So, if the testator were bound in a recognizance, on which a *scire facias* was brought, and judgment given against him in his life-time, although this judgment be not *quòd recuperet*, as in case of actions

[d] Off. Ex. 139.

[e] 3 Bl. Com. 32.

[f] 11 Vin. Abr. 297. 2 Vern. 89.

[g] Vid. 2 Bl. Com. 158. 11 Vin. Abr. 299. Com. Dig. Admon. C. 2. Fitzg. 76.

on debt, but *quòd habeat executionem*, yet, ſince execution is the fruit and effect of all judgments, this is, in ſubſtance, of the ſame nature, and may well be claſſed as a debt by judgment [h].

[h] Off. Ex. 139. Com. Dig. Admon. C. 2. Vid. alſo Yelv. 133.

Nor, as between one judgment and another, is priority of time material. The judgment creditor, who firſt ſues out a *ſcire facias*, muſt be preferred; but, before ſuch writ be ſued out, the executor has it in his election, where there are two judgment creditors, to pay which of them he pleaſes firſt; and, if each bring a *ſcire facias* on his judgment, yet the executor may confeſs either action, at his option, and that, although the *ſcire facias* were brought by the one creditor before the other [i]. So, where after verdict for the plaintiff *in aſſumpſit*, and before the day in bank, the defendant died, and judgment was entered the next term, purſuant to the ſtat. 17 *Car.* 2. *c.* 8. on *ſcire facias* brought againſt the executor, it was held, that the judgment ſhould by relation be regarded as given in the life-time of the teſtator, and be payable accordingly [k]. But where the defendant in an action on ſimple contract, after an interlocutory judgment, died, and on *ſcire facias* againſt his adminiſtrator, a writ of inquiry iſſued, and damages aſſeſſed, judgment was entered up againſt the inteſtate; the court inclined to the opinion, that the judgment purſuant to the ſtat. 8 & 9 *W.* 3. *c.* 11. ought to have been entered up, not againſt the inteſtate himſelf, but againſt his repreſentative; and was therefore not pleadable by the adminiſtrator

[i] Off. Ex. 138. 11 Vin. Abr. 299. 301.

[k] Com. Dig. Admon. C. 2. 11 Vin. Abr. 302. 1 Lev. 277. 1 Mod. 6. S. C.

to an action brought againſt him on a bond [l].' In like manner, where a defendant died after a writ of enquiry *executed*, and before the return of it, it was adjudged that a *ſcire facias* lay againſt his executor, to ſhew cauſe why the damages aſſeſſed ſhould not be recovered [m]; nor in ſuch caſe ſhall the judgment, if on ſimple contract, be preferred to a debt by ſpecialty.

A judgment ſigned at any time during the term, or the vacation immediately ſubſequent, relates back to the firſt day of the term, although the defendant died before the judgment was actually ſigned; and an execution, teſted the firſt day of the term, may be taken out upon it againſt his goods [n]. But, if the writ of execution be not teſted till after the defendant's death, it is irregular, and, in ſuch caſe, it is neceſſary to revive the judgment by *ſcire facias* againſt his repreſentative [o].

If a judgment be kept on foot merely to defraud other creditors, or, if there be any defeaſance of it in force, ſuch judgment ſhall not avail to preclude them from their debts [p].

A judgment *quòd computet*, in the obſolete action of account, is of a nature too incomplete to be privileged like other judgments [q].

A judgment in a foreign country is regarded, in our courts, merely as a debt by ſimple contract [r].

Nor,

l 11 Vin. Abr. 279. 1 Salk. 42. Com. Dig. Pleader. 2 D. 9.

m 1 Wilſ. 243.

n Bragner v. Langmead, 7 Term Rep. 20.

o 6 Term Rep. 368. Vid. alſo 7 Term Rep. 24.

p 3 Bac. Abr. 81. Off. Ex. 137.

q 11 Vin. Abr. 297. in not. 2 Freem. 103. Vid. L. of Ni. Pr. 127.

r 11 Vin. Abr. 291. 2 Fonbl. 406. 2 Vern. 540. Dougl. 1.

Nor, as we have juſt ſeen, are judgments againſt an executor comprehended within the ſame claſs as thoſe which are recovered againſt the teſtator [x]. [x] Off.Ex. 138.

In caſe a *ſcire facias* be brought on a judgment after the executor has exhauſted the aſſets in the diſcharge of ſuch of the king's debts as are abovementioned, or in the ſatisfaction of other judgments, the defendant may plead generally, that he hath fully adminiſtered; and on that plea he may give evidence of thoſe facts, and that will be a ſufficient defence [y]. But if an action be brought againſt an executor on a ſpecialty, or other debt of an inferior nature, and a judgment againſt the teſtator remains unſatisfied, it muſt be pleaded ſpecially [z]. [y] Off. Ex. 138. vid. alſo 6 Term Rep. 388 Sed vid. 3 Bac. Abr. 80. & in not. [z] Ld. Raym. 678. Salk. 311. 2 Saund. 50.

It is held, that an executor by bringing a writ of error on a judgment, may poſtpone it to a ſtatute, and the ſatisfaction of the debt on the ſtatute, pending the writ of error, ſhall be no *devaſtavit*, becauſe it was out of his power to withſtand the payment of it. The effect of the judgment is by the writ of error totally ſuſpended [a]. [a] 11 Vin. Abr. 292. in not. ibid. 298, 299. in not. Cro. Eliz. 822. L. of Ni. Pr. 142. Yelv. 29.

But, if no writ of error be brought on the judgment, and a creditor by ſtatute take out execution, the executor is bound to avail himſelf of his remedy by *audita querela*; in order to ſecure a fund for the ſatisfaction of the judgment [b]: and ſome authorities maintain, that though a writ of error be brought on the judgment, if he fail to reſort to an [b] Off. Ex. 137.

audita querela, and suffer the ſtatute to be executed, it will be a *devaſtavit* [c].

[c] Off. Ex. 137. in not. vid. Cro. Eliz. 822.

Nor is an executor bound to take notice of judgments in the courts of king's bench, common pleas, and exchequer, unleſs they are docquetted; that is, abſtracted and entered in a book, purſuant to the ſtat. of 4 & 5 *W.* & *M.* *c.* 20 [d]. According to the true conſtruction of that act, a judgment not docquetted is put on a level with ſimple contract debts [e]. If the executor have notice of the judgment, although not docquetted, he may perhaps be warranted in giving it a preference as a judgment, but if he in that caſe pay other debts firſt, he is clearly not liable as on a *devaſtavit*; thus, to charge him, it ſeems that no other than the preſcribed notice would be ſufficient [f]. And a plea of *plenè adminiſtravit* to an action brought on ſuch a judgment, will be ſupported by evidence of payment of debts by ſpecialty, or by ſimple contract [g].

[d] 3 Bl. Com. 397.

[e] Hickey v. Hayter adminiſtratrix, 6 Term Rep. 384.

[f] Per Lord Kenyon C. J. ibid.

[g] 6 Term Rep. 387, 388.

On the ſame principle, a judgment not docquetted according to the directions of the ſtatute, cannot be pleaded to an action on ſimple contract [h].

[h] Steel v Roke, 1 Boſ. & Pull. 307.

But of ſuch judgments when docquetted, an executor ſhall be preſumed to have cognizance [i].

[i] 13 Bac. Abr. 83. in not. Cro. Eliz. 793. vid. 3 Mod. 115. 11 Vin. Abr. 274, 291.

The proviſions of the ſtatute do not extend to judgments in inferior courts of record, yet the executor is bound to take notice of them at his peril [k].

[k] 11 Vin. Abr. 294. 3 P. Wms. 117. Off. Ex. 139.

A decree

A decree in a court of equity is, in reſpect to the courſe of adminiſtering aſſets, equivalent to a judgment at law, and ſhall ſtand in the ſame order of payment [l].

[l] 11 Vin. Abr. 301. 3 Bac. Abr. 81. 3 Lev. 355. 1 Veſ. 496. 2 P. Wms. 621. 3 P. Wms. 401. not. (F). Ca. Temp. Talb. 217. 4 Bro. P. C. 287. See alſo 2 Fonbl. 412. not. (s).

In general, actual and expreſs notice of a decree is neceſſary to make it binding on purchaſers. Notice by implication, in reſpect to them, is effectual only where a ſuit is depending. It never was the doctrine, that a decree, after a cauſe is ended, ſhall be conſtructive notice to purchaſers; but it is the pendency of a ſuit that creates ſuch notice in their caſe, on the ground, that a ſuit is a tranſaction in a ſovereign court of juſtice, and every man is preſumed to be attentive to what paſſes there [m], and, alſo, on the policy of preventing the transfer of rights in litigation. But an executor ſhall be affected with implied notice of a decree obtained againſt the teſtator; therefore, where an executor paid a debt due by ſpecialty, before a debt due by a decree, of which he had no actual notice, he was decreed to pay it over again out of his own eſtate [n].

[m] 2 Fonbl. 156, not. (n). 2 P. Wms. 482. 2 Atk. 174. 3 Atk. 392. Ambl. 676.

[n] 3 Bac. Abr. 81. 2 Vern. 37. 88. 2 P. Wms. 483.

Although an executor cannot plead, or give in evidence at law [o] a decree of a court of equity, yet he ſhall be protected, and indemnified in paying due obedience to ſuch decree, and all legal proceedings againſt him ſhall be ſtayed by injunction [p].

[o] 11 Vin. Abr. 291. Freem. Rep. 333, 334.

[p] 3 P. Wms. 401. not (F). 1 Vern. 143.

But if the decree be not concluſive of the matters in queſtion, as if it be merely to account, and

does not aſcertain the ſum to be paid, it is analogous to a judgment *quòd computet* at law; and that is no complete judgment till the account be ſtated. Therefore, it has been holden, that, pending a bill in equity, and after ſuch decree, an executor may pay any other debt of a higher, or an equal nature, in caſe the aſſets be legal, although he has no power of ſo doing as againſt a final decree [q].

[q] 2 Atk. 385. 3 Atk. 392. 2 Salk. 507. 11 Vin. Abr. 297. 3 Bac. Abr. 83.

Next in rank to judgments, are recognizances and ſtatutes [r].

[r] Off. Ex. 140. 2 Bl. Com. 511. Com. Dig. Admon. C. 2. Cro. Jac. 9. 35.

A recognizance is an obligation of record; it may be entered into by the party before a court of record, or magiſtrate duly authoriſed, conditioned for the performance of a particular act; as to appear at the aſſizes, to keep the peace, to pay a debt, or the like. A recognizance is in moſt reſpects like another bond. The chief diſtinction between them is, that the latter is the creation of a new debt, or an obligation *de novo*; the former is an acknowledgment on record of a prior debt, of which the form is: "That A. B. doth acknowledge to owe "to our lord the king, to the plaintiff, to C. D. or "the like, the ſum of ten pounds," with condition to be void on performance of the thing ſtipulated. And in ſuch caſe, the king, the plaintiff, or C. D. is called the cognizee, as he that enters into the recognizance is called the cognizor. This inſtrument being either certified to, or taken by, the officer of ſome court, is authenticated only by the record of ſuch court, and not by the party's ſeal [s].

[s] 2 Bl. Com. 341.

Of ſecurities by ſtatute there are three ſpecies: ſtatutes merchant, ſtatutes ſtaple, and recognizances in the nature of ſtatutes ſtaple; and, though they are fallen into diſuſe, yet, as they are frequently alluded to in argument, eſpecially on this ſubject, it ſeems neceſſary to give ſome explanation of them [u]. In order to form a diſtinct notion of their nature, we muſt recur to different acts of parliament.

[u] Vid. 2 Bl. Com. 160. 2 Reeve's Hiſt. Eng. L. 160. 392. 4 Reeve's Hiſt. Eng. L. 253, 254 Sull. Lect. 155, 156.

By ſtat. 13 *E.* 1. called the ſtatute *de mercatoribus*, a merchant is empowered to cauſe his debtor to appear before the mayor of London, or before ſome chief warden of a city, or of any other town which the king ſhall appoint, or before other ſufficient men, choſen and ſworn thereto, when the mayor or chief warden cannot attend, or before one of the clerks, to be appointed by the king, and acknowledge the debt, and the day of payment. And the recognizance, that is, ſuch acknowledgment, ſhall be duly entered by a clerk on a double roll, of which one part ſhall remain with the mayor, or chief warden, and the other be depoſited with the clerks; one of whom, with his own hand, ſhall write an obligation, to which writing the ſeal of the debtor ſhall be affixed, with the king's ſeal, provided for that purpoſe; which ſeal ſhall be of two pieces, of which the greater piece ſhall remain in the cuſtody of the mayor, or the chief warden, and the other piece in the keeping of ſuch clerk; and, if the debtor do not pay at the day limited, the merchant ſhall again appear before the mayor,

and clerk, with his obligation; and, if it be found by the roll or writing, that the debt was acknowledged, and the day of payment expired, then the ſtatute preſcribes certain ſteps to be taken for the recovery of the debt. This obligation is called a ſtatute merchant.

In regard to the kind of ſtatutes ſecondly above-mentioned, the ſtaple, that is to ſay, the grand mart for the principal commodities and manufactures of England, was, by the ſtat. 27 *E.* 3. held in certain trading towns. And, in order that contracts made within the ſame might be more effectually enforced, that act directs a courſe ſimilar to a ſtatute merchant, and enacts, that every mayor of the ſtaple ſhall have power to take recognizances of debts ariſing on ſuch contracts, in the preſence of the conſtables of the ſtaple, or of one of them; and, that in every ſtaple there ſhall be a ſeal remaining in the cuſtody of the mayor, under the ſeals of the conſtables; and all obligations which ſhall be made on ſuch recognizances, ſhall be ſealed with that ſeal. Such obligation is denominated a ſtatute ſtaple.

The benefit of this mercantile tranſaction is extended to all the king's ſubjects in general, by virtue of the ſtat. 23 *H.* 8. *c.* 6. by which it is enacted, that the chief juſtice of the king's bench, and the chief juſtice of the common pleas, and in their abſence, out of term, the mayor of the ſtaple of Weſtminſter, and the recorder of the city of London,

don, jointly, ſhall have full power and authority to take recognizances or acknowledgments of the king's ſubjects for the payment of debts, according to a form ſpecified; and that every obligation ſo acknowledged ſhall be ſealed with the ſeal of the cognizor, and alſo with ſuch ſeal as the king ſhall appoint for the ſame, and with the ſeal of one of ſuch juſtices, and be ſubſcribed by him, or with the ſeals of ſuch mayor and recorder, with their names ſubſcribed. The ſtatute then directs, that ſuch recognizance ſhall be duly inrolled in a manner ſimilar to the ſtatute merchant, and provides, that in default of payment of the debt contained in ſuch obligation, the cognizee ſhall have the ſame advantages in every reſpect, as in the caſe of an obligation by ſtatute ſtaple. The obligation purſuant to this act is ſtyled, a recognizance in the nature of a ſtatute ſtaple.

Such are the three ſpecies of ſtatutes.

Although recognizances are entered on the rolls of the king's courts, while ſtatutes are conſigned to the cuſtody of the party (and hence are called pocket records [t]), yet both ſpecies of ſecurities having been entered into voluntarily, and privately, are regarded as equal in their nature, and payable in the ſame order [u]. Nor is it material in regard to payment by the executor, which of them are prior, or ſubſequent in point of date. Therefore, where there are many cognizees, he may prefer a ſubſequent to a prior ſtatute, or recognizance, for they

[t] 5 Co. 28. b.

[u] Off. Ex. 140.

they all equally affect the perſonal eſtate; although, as to lands, the firſt in point of time ſhall have the preference [w].

[w] Off. Ex. 140. 3 Bac. Abr. 81. Roll. Abr. 925. Com. Dig. Admon. C. 2.

If the ſtatute or recognizance be defeaſanced for the payment of a ſum of money at a day certain, although the day be not arrived, yet it is a debt of the ſame claſs with other ſtatutes; for it is a preſent, and immediate duty, to be diſcharged at a future period [x]. So, where a teſtator acknowledged a recognizance in the nature of a ſtatute ſtaple, of which the defeaſance, after reciting, that the teſtator, and cognizee as his ſurety, were bound in an obligation to J. S. for the debt of the teſtator, with a condition for payment of one hundred pounds at a future day, provided, that, if the teſtator, his executors, or aſſigns, ſhould pay the one hundred pounds to J. S. at the day, the ſtatute ſhould be void; it was held, that although the day of payment were not yet come, and it were a collateral ſum to be paid to a ſtranger to the ſtatute, and not to the cognizee, and therefore no duty to him, and although the heir of the teſtator might poſſibly pay the money at the day, yet, inaſmuch as the ſtatute was for the payment of a certain ſum of money, with which by intendment the executor would be charged, he might, although before the day of payment, plead this ſtatute in bar to an action of debt on a bond [y]. But, if the teſtator in his life-time enter into a ſtatute for performance of covenants, and none of them are broken, to an action of debt on ſpecialty, the executor cannot plead this ſtatute;

[x] 11 Vin. Abr. 286. 1 Roll. Rep. 405. Vaugh. 103.

[y] 11 Vin. Abr. 286. Cro. Car. 362.

for, perhaps, the covenants may never be broken, and it would be unreaſonable to allow him to elude a juſt debt on a contingency which may never happen [z]. So, if it be for payment of money when an infant ſhall come of age, it ſhall be no bar to other debts, for the infant may die before that time [a].

[z] 3 Bac. Abr. 81. 5 Co. 28.

[a] 2 Roll. Abr. 925.

If a ſtatute be joint and ſeveral, the cognizee may elect to ſue either the ſurviving cognizor, or the executor of him who is dead, or both, in ſeparate actions. If it be joint only, the ſurvivor alone is liable [b].

[b] 11 Vin. Abr. 288. 1 Mod. 165.

The remedy on a ſtatute is more expeditious than on a recognizance; ſince execution may be taken out on a ſtatute without a *ſcire facias*, or other ſuit. But in caſe of a recognizance, if a year paſs after the acknowledgment, no execution can be ſued out againſt the party without a *ſcire facias*, and, in caſe of his death, although a year be not elapſed, yet a *ſcire facias* muſt be ſued out againſt his executor [c].

[c] Off. Ex. 140.

If a *ſcire facias* be ſued out on a recognizance, an executor ſhall not defeat it by a voluntary payment of a debt by ſtatute; but, if, before judgment on the *ſcire facias*, execution be ſued out againſt him on the ſtatute, it ſhall prevail [d].

[d] Off. Ex. 140. in not. 11 Vin. Abr. 299. 2 Anderſon, 157. pl. 87.

A recognizance not inrolled ſhall be conſidered as a bond, and payable accordingly [e].

[e] 1 P. Wms. 334. 2 Vern. 759. S. C.

So

So a ſtatute not regularly taken, may be good as an obligation [e].

[e] Cro. Eliz. 355. 461. 544. 2 Roll. Abr. 149.

Nor are other inferior debts of record to be forgotten; as iſſues forfeited, fines impoſed by the judges at Weſtminſter, or at the aſſizes, by the juſtices at quarter ſeſſions, by commiſſioners of ſewers, or of bankrupts, or by ſtewards of leets, and the like; for all theſe are debts of record, and ſo payable by the executor [f]. Of all of which, as well as of thoſe by recognizance or ſtatute, he is bound to take notice at his peril [g].

[f] 11 Vin. Abr. 278. Off. Ex. 118.

[g] Vid. 2 Vern. 750.

SECT. III.

Of debts by ſpecialty,—and herein of rent:—of debts by ſimple contract.

THE claſs of debts next in ſucceſſion are debts by ſpecial contracts; as for rent, and alſo on bonds, covenants, and other inſtruments under the ſeal of the party.

Although in regard to rent, the leſſor has a remedy often more efficacious in his own hands, by diſtraining; yet, between a debt by obligation, and a debt by covenant for a ſum certain, or for damages on a breach of covenant, and a debt for rent, there is no diſtinction of rank, they are all debts

debts of the same degree [i]. Nor does it make any difference whether the rent be reserved by lease, in writing, or by parol: for in the latter case, the rent arises equally from the profits of the land, and is regarded as a debt by specialty. Nor is the nature of the debt changed by the determination of the lease: the contract remains in the realty, although the right of distress be gone [k].

[i] Off. Ex. 146. 2 Bl. Com. 511. Com. Dig. Admon. C. 2. 3 Burr. 1384. See also 1 Salk. 326.

[k] 3 Bac. Abr. 82. 96. 3 Lev. 267. 2 Ventr. 184. Com. Rep. 67. 145. Comb. 183. 11 Vin. Abr. 289. in not. Vid. 3 Bl. Com. 11. Stat. 8 Ann. c. 14.

But it is necessary to consider rent as distinguished into such as hath been left in arrear by the testator, and such as hath accrued due subsequent to his death.

For rent, which was in arrear in the testator's life-time, the executor is liable merely in that character; as the testator's debt he can be sued for it in the *detinet* only, and to such action may plead, that he has fully administered [l]: Whereas, for the subsequent rent, the executor is in general regarded as personally responsible. He has no right, as we have already seen [m], to waive the term, for he must renounce the executorship in toto, or not at all; and if he enter on the demised premises, as by his office he is bound to do, the lessor may charge him as assignee in the *debet*, and *detinet* for the rent incurred subsequent to his entry [n].

[l] 1 Wilf. 4. Com. Dig. Admon. B. 14.

[m] Supr. 109.

[n] 1 Salk 297. 317. Off. Ex. 147.

If the profits of the land exceed the amount of the rent, as the law *primâ facie* supposes, such of the profits as are sufficient to make up the rent, shall be appropriated to the payment of the lessor, and cannot

cannot be applied to any other purpoſe. Therefore, if in ſuch caſe the leſſor bring an action againſt the executor for the rent, he cannot plead *plenè adminiſtravit*, for that plea would confeſs a miſapplication of the profits; ſince no other payment out of them can be juſtified till the rent be anſwered [n]. On the other hand, the profits of the land may be inadequate to the rent. In a variety of caſes, they may be eaſily ſuppoſed inſufficient for a given period, although the leaſe may on the whole be beneficial. As in reſpect to rent for the occupation of premiſes from Michaelmas to Lady Day, eſpecially, where almoſt the whole profit is taken in the ſummer; as in the caſe of a leaſe of tithes, or of meadow grounds, which are uſually flooded in the winter [o]. So the profits for a ſeries of years may be leſs than the amount of the rent, although the leaſe for the whole term may be of no ſmall value; as in the caſe of a leaſe of woods, which are fellable only once in eight or nine years, and the felling has been very recent [p]. In theſe, and the like inſtances, the executor is perſonally liable only to the extent of the profits, and for ſuch proportion of the rent as ſhall exceed the profits, is chargeable merely in the capacity of executor, or, in other words, as far only as he has aſſets; and, in ſuch caſe, to an action brought by the leſſor againſt him in the *debet*, and *detinet*, he muſt diſcloſe the matter by ſpecial pleading, and pray judgment whether he ſhall be charged otherwiſe than in the *detinet* only, for more than the actual profits [q].

[n] 1 Salk. 317.

[o] Off. Ex. 149.

[p] Off. Ex. 149.

[q] 1 Salk. 317.

Thus

Thus the profits of the land are to be applied by the executor, in the firſt place, to the diſcharge of the rent, and, if that fund ſhould prove inſufficient, the reſidue of the rent is payable out of the general aſſets, and ſtands on the ſame footing with other debts by ſpecialty.

Debts by bond, and other inſtruments under the ſeal of the party, are of the ſame claſs with debts for rent [s]; and an executor is bound to pay a debt on ſpecialty before a debt by ſimple contract, although the bond be not yet due. For the obligation is a preſent duty, and the condition is but a defeaſance of it [t]. Hence it hath been adjudged, that if an action be brought againſt an executor on a ſimple contract of the teſtator, he may plead that his teſtator entered into a bond payable at a future day, and it ſhall cover aſſets to the amount of the ſum payable by the condition [u]. But if the teſtator die indebted to A. in one ſpecialty, and to B. in another, and of A.'s debt the day of payment is paſt, and of B.'s debt the day of payment is to come, the executor has no right to pay B. in preference to A.: Yet if A. forbear to demand or ſue for his debt, till the debt of B. become payable, then it is in the election of the executor to pay which of them he thinks proper [w]. By the cuſtom of London, if a citizen of London die indebted by ſimple contract, ſuch debt is equal to a debt by ſpecialty, and the payment of it by the executor ſhall be binding on the obligor of a bond, though a ſtranger, and no citizen [x].

[s] Off. Ex. 146.

[t] 11 Vin. Abr. 304. Leon. 187.

[u] 3 Bac. Abr. 81. Cro. Eliz. 315. 3 Lev. 57. Cro. Car. 362. Ca. Temp. Hard. 228.

[w] Off. Ex. 143. Com. Dig. Admon. C. 2.

[x] 3 Bac. Abr. 82. Cro. Eliz. 409. Noy, 53. Roll Abr. 557. 5 Co. 82. b. 83.

In

In the adminiſtration of aſſets, a contingent ſecurity, as for example, a bond to ſave harmleſs, ſhall not ſtand in the way of a debt by ſimple contract [y]. And, if ſubſequent to the payment of the ſimple contract debt the contingency ſhould happen, it ſeems reaſonable that evidence of ſuch payment ſhould be admitted on the executor's plea of *plenè adminiſtravit*, to an action by the ſpecialty creditor [z].

[y] 11 Vin. Abr. 305. 2 Vern. 101.

[z] 11 Vin. Abr. 307. Allen, 40, Sed vid. Goldſb. 142.

But where the contingency has taken place, although the debt conſequent upon it has not yet been paid, it may be pleaded to an action by a ſimple contract creditor. As, where the teſtator had executed a bond to A. in two thouſand eight hundred pounds, conditioned to indemnify him againſt another bond for eight hundred pounds, which he had executed jointly with the teſtator to B. for the debt of the teſtator, in whoſe life-time the eight hundred pounds had become due, and were ſtill unpaid; on the executrix's diſcloſing theſe facts in a plea to an action of *aſſumpſit*, and ſtating that ſhe had adminiſtered all, except ſo much as would ſatisfy ſuch indemnity bond, it was held to be a ſufficient defence [a].

[a] Cox v. Joſeph, 5 Term Rep. 307.

A bond merely voluntary, ſhall be poſtponed to ſimple contract debts which are *bonâ fide* owing; but ſuch bond, if not to the prejudice of creditors, muſt be paid by the executor, and in preference to legacies. For a bond, however voluntary, transfers a right in the life-time of the obligor;

whereas legacies arise from the will, which takes effect only from the testator's death, and therefore they ought to be postponed to a right created in his life-time [b]. But an executor has no authority to pay a bond founded on an usurious contract, or a bond *ex turpi causâ*. Such payment will amount to a *devastavit*, as well against legatees as against creditors [c].

[b] 11 Vin. Abr. 304, 305. 1 Eq. Ca. Abr. 84. 143. 3 Bac. Abr. 81, 82. Ca. Temp. Talbot. 156. 3 P.Wms. 182. 222. 339. Fin. Rep. 232.

[c] 11 Vin. Abr. 307. Brownl. 33. Hob. 167. 1 Vef. 254.

If there be a joint and several obligation, an executor of a deceased obligor may pay the debt out of the estate of the testator, and plead it to other actions by creditors on specialties. But if the obligation be joint only, there the survivor must be charged out of his own estate, and the executors of the deceased obligor are not liable on the instrument [d].

[d] 11 Vin. Abr. 288. 1 Mod. 165. Freem. Rep. 127.

A demand arising from a covenant, as I have before observed, is of the same nature, whether it be for a specific sum, or whether it sound merely in damages [e]. Thus the grantor's covenant in a marriage settlement for him and his heirs, that the premises are free from incumbrances, shall rank equally with debts on bond [f]. So, to an action on simple contract against an executor, he may plead that the testator entered into certain covenants, and may shew the breach of them, and state the amount of the damages incurred, and that he has not assets more than to satisfy them: The plea will be good, although the damages are not liquidated [g]. But where the husband by marriage-articles having

[e] 3 Burr. 1380.

[f] 3 Bac. Abr. 81. 11 Vin. Abr. 292.

[g] 11 Vin. Abr. 305. 6 Mod. 144.

agreed to ſettle one thouſand five hundred pounds *per annum* on the iſſue, made a deficient ſettlement, and deviſed all his unſettled eſtates for payment of debts, it was adjudged in equity, that as the ſettlement was of leſs than the ſtipulated value, the widow and infant were to be compenſated in damages; but that as the articles made no mention of any ſpecific land, nor contained any covenant in regard to its value, they were to come in after creditors by bond [h].

[h] 11 Vin. Abr. 290. 305. 2 Vern. 272.

If A. covenant to pay a ſum of money, and die before payment, it may be recovered againſt his executors [i]: Whereas it has been held, that if he covenant that his executors ſhall pay the money, no action can be maintained againſt them, on the principle, that it could not be a debt of the executor, where it was not a debt of the teſtator [k]; but this latter caſe is of very doubtful authority, for there alſo the teſtator was himſelf bound, and the lien falls upon his repreſentatives, though he himſelf could not have been ſued; and it ſeems that on either covenant they are equally reſponſible [l].

[i] Cro. Eliz. 232. Sheph. Epit. 990.

[k] 11 Vin. Abr. 276 Cro. Eliz. 232. vid. Co. Litt. 386.

[l] Vid. 3 Burr. 1383, 1384.

Laſt in the order of payment, are debts on ſimple contract; as on bills and notes not under ſeal, and verbal promiſes [m]. On contracts of this nature, debts due to the king ſhall, it ſeems, be ſatisfied before debts which are due to ſubjects [n]; the wages alſo of domeſtic ſervants, and of labourers, appear with great reaſon entitled to a preference; but, with the exception of theſe, the executor has a right likewiſe

[m] 2 Bl. Com. 511. Off. Ex. 155.

[n] 3 Bac. Abr. 80. in not.

likewiſe in this ſpecies of debts, to prefer in payment whichever he pleaſes [y].

[y] 2 Bl. Com. 511. 1 Roll. Abr. 927. 11 Vin. Abr. 274. in not. Sheph. Epit. 986.

SECT. IV.

Of a creditor's gaining priority by legal, or equitable proceſs.—Of notice to an executor of debts by ſpecialty, or ſimple contract.

SUCH is the order which the law preſcribes to an executor for the payment of debts; and, although he has a right to pay one creditor in preference to another of the ſame degree, yet this election may be controlled by legal or equitable proceedings againſt him, of which he has due notice [a]. Thus, if an action be properly commenced againſt an executor for any ſpecific debt, it muſt be preferred by him in payment to others of the ſame claſs. Nor, in that caſe, ſhall he be warranted in making any voluntary payment of ſuch other debts, to defeat the party of his remedy [b].

[a] Off. Ex. 145.

[b] 11 Vin. Abr. 296. in not. 2 Vern. 300. 2 Fonbl. 412. Com. Dig. Admon. C. 2. 3 Bac. Abr. 83. 2 Chan. Ca. 201. 2 Vern. 62. Off. Ex. 143. 146.

Yet, although one creditor commence an action, if another creditor, in equal degree, commence a ſubſequent action, and firſt recover judgment, he muſt be firſt ſatisfied. Hence, an executor has it in his election to give a preference, by confeſſing judgment in the action of the one, and pleading ſuch judgment to the action of the other [c]. But if, for the purpoſe of favouring the

[c] Off. Ex. 145. 11 Vin. Abr. 296. in not. 302. 1 Lev. 200. 1 P. Wms. 295. Carter 228. 2 Vern. 300. 2 Fonbl. 411, 412. 5 Term Rep. 238, 239.

claim of one plaintiff in prejudice to that of another, he plead a matter, which he knows to be falſe, the plea ſhall not be available, as it ſhall be, if the falſity exiſt not in his own knowledge, as if he plead *non eſt factum teſtatoris* [d].

[d] 11 Vin. Abr. 296. 2 Chan. Ca. 201. 2 Vern. 62.

And, even, after an interlocutory judgment, and before the execution of a writ of enquiry of damages, he may confeſs a judgment in an action for a debt of equal degree [e]; for he is, in no caſe, bound againſt his will to defend a ſuit, and expend the aſſets in coſts, where the caſe is clear [f].

[e] 2 Atk. 385.

[f] Off. Ex. 145.

According to ſeveral adjudged caſes [g], the filing of a bill in equity ſhall equally prevent the alienation of aſſets, as the filing of an original at law. And, therefore, if a ſuit in chancery be inſtituted by a creditor againſt an executor, he cannot juſtify a voluntary payment of another creditor of the ſame order. But, a deciſion, to that effect, was reverſed in the Houſe of Lords, principally on the ground, that a decree cannot be pleaded at law to an action brought againſt an executor on another debt of equal rank. However, it is now ſettled, that, though a decree in equity cannot be pleaded at law, it is equivalent, in the adminiſtration of aſſets, to a judgment; and, therefore, that if a decree have a real priority in point of time, not by fiction, and relation to the firſt day of term, it ſhall be preferred, in the order of payment, to ſubſequent judgments, and the executor, as we have ſeen, ſhall be protected in his obedience to ſuch decree, and all proceedings

[g] 2 Fonbl. 412. not. s. Prec. Chan. 79. 188. 1 Vern. 369. 3 Bac. Abr. 81.

proceedings againſt him at law, ſtayed by injunction [h]. So, pending a ſuit in equity by one creditor, an executor may confeſs a judgment at law, in favour of another creditor of the ſame degree [i].

[h] Bunb. 48. 3 P. Wms. 401. not. F. Forreſt 217. 1 Vern. 143. 2 Vern. 37. 88. Ca. Temp. Talb. 217. 4 Bro. P. C. 287.

He may, alſo, confeſs a judgment, after a decree *quòd computet*, if before a final decree. Such decree *quòd computet*, is analogous to an interlocutory judgment at law; it does not paſs in *rem judicatam*, until the final decree [k].

[i] 1 P. Wms. 295. Ca. Temp. Talb. 225.

[k] 2 Atk. 385. Ca. Temp. Talb. 217.

Nor will equity interpoſe, where, after an action brought by one creditor, an executor confeſſes judgment to another creditor in equal degree [l]; even, although the judgment be given on a *quantum meruit*, without a writ of enquiry to aſcertain the damages, if they be ſo laid, in the declaration, as not to exceed the debt which is really due [m]. Nor, where a creditor ſues an executor at law, and in equity, at the ſame time, for the ſame demand, will equity compel him to make his election in which of the courts he will proceed, in caſe the executor be attempting to prefer other creditors before him, by confeſſing judgments to them, but will merely reſtrain him from taking out execution on the judgment, without leave of the court [n]. Nor will a mere demand by the creditor diveſt the executor of his right of giving ſuch preference; that effect can be produced only by the proceſs of a court of juſtice [o]. Thus, the executor is inveſted with large diſcretionary powers of preferring one

[l] 3 Bac. Abr. 83. in not. 1 P. Wms 295.

[m] 11 Vin. Abr. 298. in not. 1 P. Wms. 295.

[n] 3 Bac. Abr. 82. Barnard Ch. Ca. 277.

[o] Off. Ex. 145.

creditor to another of the same class; and, in certain cases, he may avail himself of the privilege with great propriety, and on solid reasons [p]. But, in general, on a deficiency of assets, it were a more honourable and conscientious discharge of his duty, as far as he has the power of deciding, to pay debts of equal degree in equal proportions [q].

[p] 11 Vin. Abr. 270. 288. Sid. 21. Off. Ex. 260.

[q] Off. Ex. 260, 261. 3 Bl. Com. 19.

Nor is an executor warranted merely in the payment of one debt before another of the same order; he may, also, pay a debt of an inferior nature, before one of a superior, of which he has no notice [r], provided a reasonable time has elapsed after the testator's death; for such payment, if precipitate, would be evidence of fraud.

[r] 3 Bac. Abr. 82. in not. L. of Ni. pr. 178.

Of debts of record, supposing, in the case of judgments, they are docquetted, it has been already stated, an executor is bound to take cognizance, as well as of a decree in equity: constructive notice, in respect to them, is sufficient [s]; but of other species of debts there must be actual notice.

[s] Dyer 32. in not. 3 Bac. Abr. 83. in not. Cro. Eliz. 793. 2 Vern. 88, 89. Sed vid. L. of Ni. P. 178. 3 Mod. 115.

It has been asserted, that such notice must be by suit [t]; but it is perfectly clear, that an executor, if he be by any means apprised of a debt of a higher degree, would not be justified in exhausting the assets in the discharge of one which is inferior, yet, unless he had some notice of the former, he incurs no risque by the payment, after a competent time, of the latter. Hence it has been held, that an

[t] 3 Bac. Abr. 83. in not. 1 Mod. 175. Vid. Fitzgib. 77.

an executor may plead a judgment recovered againſt him on a ſimple contract, to an action of debt on a ſpecialty, if he had no notice of ſuch ſpecialty[u]; and may, even, voluntarily pay, without notice, ſuch inferior debt, in excluſion of the ſuperior, and on a very juſt principle; for, otherwiſe, it might be in the power of an obligee to ruin an executor, by ſuppreſſing a bond until all the aſſets were expended in the payment of ſimple contract debts[w]. And, indeed, after a ſuit is commenced, yet, before he has notice of the plaintiff's demand, he is warranted in paying any other creditor[x]. On the other hand, an executor is not authoriſed to confeſs a judgment for a debt of an inferior nature, if he has notice of the exiſtence of a ſuperior. Thus, where an executor to an action on bond, pleaded a judgment confeſſed by him on the preceding day, on a ſimple contract debt, the plea was diſallowed, on the ground of its not averring, that the defendant had no notice of the plaintiff's demand[y].

[u] 3 Bac. Abr. 82. in not. 2 Show. 492. 3 Mod. 115. L. of N. P. 178. Fitzg. 76.

[w] 3 Bac. Abr 82. Off. Ex. 145. Vid. 3 Lev. 115.

[x] Off. Ex. 145. Plowd. 279. Finch L. 79. 3 Mod. 115. L. of Ni. Pr. 178.

[y] Sawyer v. Mercer, 1 Term Rep, 690.

If, ignorant of the exiſtence of a bond, he confeſs a judgment on a ſimple contract, and, afterwards, judgment be given againſt him on the bond, he is bound, however inſufficient the aſſets, to ſatisfy both the judgments, for he might have pleaded the firſt, if he had not had aſſets for both[z]. So, alſo, a judgment muſt be ſatisfied, though recovered againſt one executor only where there are ſeveral[a], or recovered againſt one executor by the name of an adminiſtrator, or *vice verſâ*[b].

[z] Com. Dig. Admon. C. 2, 3 Lev. 114.

[a] Com. Dig. Admon. C. 2. Cro. Eliz. 471. 1 Sid. 404. 1 Lev. 261.

[b] Com. Dig. Admon. C. 2, Cro. Eliz. 646. 1 Sid. 404. Sed vid. Cro. Eliz. 41.

CHAP. III.

OF AN EXECUTOR'S RIGHT TO RETAIN A DEBT DUE TO HIM FROM THE TESTATOR.—UNDER WHAT LIMITATIONS.

IF a debtor appoint his creditor to the executorſhip, he is allowed to retain his debt, in preference to all other creditors of an equal degree. This remedy ariſes from the mere operation of law, on the ground, that it were abſurd and incongruous that he ſhould ſue himſelf, or that the ſame hand ſhould at once pay and receive the ſame debt. And, therefore, he may appropriate a ſufficient part of the aſſets, in ſatisfaction of his own demand; otherwiſe he would be expoſed to the greateſt hardſhip; for, ſince the creditor who firſt commences a ſuit is entitled to a preference in payment, and the executor can commence no ſuit, he muſt, in caſe of an inſolvent eſtate, neceſſarily loſe his debt, unleſs he has the right of retaining. Thus, from the legal principle of the priority of ſuch creditor as firſt commences an action, the doctrine of retainer is a natural deduction; but the privilege is accompanied with this limitation, that he ſhall not retain his own debt as againſt thoſe of a higher degree; for the law places him merely in the ſame ſituation as if he had ſued himſelf as executor, and recovered his debt, which there

there could be no room to suppose, during the existence of those of a superior order [a]. As, where A. before his marriage, covenanted with B. and C. to leave them by his will, or that his executors, within six months after his death, should pay them seven hundred pounds, in trust, to pay the interest to his wife for life, and, on her death, to divide the principal among his children, and, in default of children, as he should appoint, and bound himself, his heirs, executors, and administrators, in a penalty for performance; on his dying before his wife, without issue and intestate, it was held, that B. in the character of his administrator, might retain assets to that amount, during the life of the widow, against a bond creditor, who sued before the six months were elapsed [b].

[a] 2 Bl. Com. 511. 3 Bl. Com. 18, 19. Cas. Pr. 32. 142, 143. Com. Dig. Admon. C. 2. 3 Bac. Abr. 10. 83 Roll. Abr. 922, 923. Plowd. 185. 543. 11 Vin. Abr. 72. 261. Winch. 19. Hargr. Co. Litt. 264. not. 1.

[b] 3 Burr. 1380.

So, if A. and B. be jointly and severally bound in an obligation, and A. appoint the executrix of the obligee his executrix, and die, leaving assets, she is not compelled to resort to an action against B., but is entitled to retain for the debt; in case there be not assets, she has a right to pursue her remedy on the bond against B. [c]. So, if A. be indebted to B. and C. by several bonds, and die, and D. take out administration to A., and, afterwards, B. die, having appointed D. his executor, he may retain effects of which he is possessed as administrator of A., to satisfy the debt due to him as the executor of B. [f]. If A. be indebted in a bond to B., and die, having appointed B. his executor, who, after having intermeddled with the goods, and

[c] Com. Dig. Admon. C. 1. Hob. 10. 3 Bac. Abr. 10. 3 Kebl. Rep. 116. 2 Lev. 73.

[f] 11 Vin. Abr. 261. 2 Brownl. 50.

and before probate, alſo dies; although, before his death, he did not expreſsly elect in what particular effects he would have the property altered, yet, it muſt be preſumed, that it was his intention to pay his own debt firſt, and, therefore, his executor ſhall have the ſame power of retaining as belonged to him [g]. So, for a bond executed by the teſtator to A. conditioned for the payment of money to B., B. it ſeems, in caſe he is executor, may retain [h]. So, if adminiſtration be granted to a creditor, and afterwards repealed at the ſuit of the next of kin, ſuch creditor may retain againſt the rightful adminiſtrator [i]. In ſhort, wherever an executor might have been ſued, or might have paid a debt, he has authority to retain [k].

[g] 11 Vin. Abr. 263. 3 P. Wms. 183, 184. and note E.

[h] Com. Dig. Admon C. 2. Semb. Raym. 484.

[i] 11 Vin. Abr. 265. 1 Salk. 38.

[k] Com. Dig. Admon. C. 2. 3 Burr. 1384.

But, where A. and B. were joint obligors in a bond, the former as principal, the latter as ſurety, A. died, B. took out adminiſtration to him, and, on forfeiture of the bond, diſcharged the debt; it was held, that he could not retain, for, by joining in the bond, the debt became his own [l]. Yet, in ſuch caſe, it ſeems, he might retain for the money paid, as conſtituting a ſimple contract debt.

[l] 11 Vin. Abr. 262. Godb. 149.

A retainer for a debt may either be given in evidence, on the plea of *plenè adminiſtravit*, or it may be pleaded ſpecially [m].

[m] Bl. Rep. 965. 3 Burr. 1383. 11 Vin. Abr. 266. 1 Brownl. 75.

An executor may retain, both at law and in equity, for his whole debt, as againſt other creditors of the ſame degree [n]: but, equity will interpoſe

[n] 11 Vin. Abr. 265. in not. 1 P. Wms. 295.

poſe to reſtrain him from perverting this privilege to the purpoſes of fraud [o]. Nor will a mere nomination of a creditor to the executorſhip, if he refuſe to act, extinguiſh his legal remedy for the recovery of his debt [p]. Hence, if a creditor be appointed executor with others, he may ſue them, eſpecially if he hath not adminiſtered [q]. If there be not perſonal aſſets he may ſue the heir, where the heir is bound [r].

[o] 3 Bac. Abr. 83. in not. 10 Mod. 496.

[p] Rawlinſon v. Shaw, 3 Term Rep. 557.

[q] 3 Bac. Abr. 10. in not. Off. Ex. 33.

[r] Hargr. Co. Litt. 264. b. not. 1. Salk. 304. Off. Ex. 33, 34.

CHAP.

CHAP. IV.

OF THE PAYMENT OF LEGACIES.

SECT. I.

Legacy, what—who may be legatees—who not—legacies general and ſpecific—lapſed and veſted.

HAVING thus diſcuſſed the duty of an executor in regard to the payment of debts according to the order preſcribed by law, the payment of legacies, in the next place, demands his attention.

A legacy is a bequeſt, or gift of perſonal property by will.

All perſons are capable of being legatees, with ſome ſpecial exceptions by common law, and by ſtatute [a].

[a] 2 Bl. Com. 512. 4 Burn Eccl. L. 313. 4 Bac. Abr. 337.

To this diſability all traitors are ſubject [b]. By ſtats. 25 *Car.* 2. *c.* 2. and 1 *Geo.* 1. ſtat. 2. *c.* 13. perſons required to take the oaths, and otherwiſe qualify themſelves for offices, and omitting to do ſo, ſhall be incapable of a legacy. By ſtat. 9 & 10 *Wm.* 3. *c.* 32. perſons denying the Trinity, or aſſerting that there are more Gods than one, or denying the Chriſtian religion to be true, or the

[b] 2 Bl. Com. 512.

holy ſcriptures to be of divine authority, ſhall for the ſecond offence be alſo incapable of any legacy. Likewiſe, by ſtat. 5 *Geo.* 1. *c.* 27. artificers going out of the kingdom, or exerciſing their trades in foreign parts, ſhall be ſubject to the ſame diſqualification.

Of legacies there are two deſcriptions; a general legacy, and a ſpecific legacy [c]. The former appellation is expreſſive of ſuch as are pecuniary, or merely of quantity. Under the denomination of ſpecific legacies, two kinds of gifts are included; as, firſt, where a certain chattel is particularly deſcribed, and diſtinguiſhed from all others of the ſame ſpecies; as, "I give the diamond ring preſented to me by A." The ſecond is, where a chattel of a certain ſpecies is bequeathed without any deſignation of it as an individual chattel; as, "I give a diamond ring." A bequeſt in the former mode can be ſatisfied only by the delivery of the identical ſubject; and if it be not found among the teſtator's effects, it fails altogether, unleſs it be in pawn, when the executor muſt redeem [d] it for the legatee. But a bequeſt of the latter deſcription may be fulfilled by the delivery of any thing of the ſame kind [e].

[c] 4 Bac. Abr. 337. 425. 2 Bl. Com. 512.

[d] 2 Bro. Ch. Rep. 113. 4 Bac. Abr. 355. Swinb. part 7. ſ. 20.

[e] 2 Fonbl. 374. note (o). 1 Atk. 416. Forreſt. 227. Ambl. 57.

Although the courts are averſe from conſtruing legacies to be ſpecific [f], yet, if the words clearly indicate an intention to ſeparate the particular thing bequeathed from the general property of the teſtator, they ſhall have that operation. Hence, under ſome circumſtances,

[f] Ambl. 310.

circumſtances, even pecuniary legacies are held to be ſpecific. As a certain ſum of money in a certain bag or cheſt [g], or the bequeſt of a ſum of money in the hands of A. [h], or of two thouſand pounds, the balance due to the teſtator from his partner on the laſt ſettlement between them, if the teſtator did not draw ſuch money out of trade before he died [i]. So a bequeſt of a bond, or of the teſtator's ſtock in a particular fund, hath been thus claſſed [k], as likewiſe has a legacy to be paid out of the profits of a farm, which the teſtator directed to be carried on [l].

[g] 1 Atk. 508.

[h] 1 P. Wms. 540.

[i] Ambl. 310.

[k] 2 Bro. Ch. Rep. 108. Forreſt, 152. 1 Veſ. 425. 1 Eq. Ca. Abr. 298.

[l] 2 Bro. Ch. Rep. 125.

In like manner the teſtator may carve ſpecific legacies out of a ſpecific chattel; as where he gives part of the debt due to him from A., it will be a ſpecific legacy [m]. So a bequeſt of part of the teſtator's ſtock in a certain fund, ſhall bear the ſame conſtruction [n].

[m] 3 Atk. 103.

[n] 2 Veſ. 563. See 2 Fonbl. 374. note (o). 1 P. Wms. 540. note (1).

So where A. deviſed to his wife all his perſonal eſtate at B., this was held to be a ſpecific legacy; and the ſame as if he had enumerated all the particulars there [o].

[o] 2 Fonbl. 376. 2 Vern. 688.

On the other hand, a mere bequeſt *of quantity*, whether of money, or of any other chattel, is a general legacy; as of a quantity of ſtock [p]. And where the teſtator has not ſuch ſtock at his death, ſuch bequeſt amounts to a direction to the executor to procure ſo much ſtock for the legatee [q]. So, the purpoſe to which a general legacy is to be ap-

[p] 1 P. Wms. 540. not. 1. 1 Atk. 414. 2 Veſ. 562.

[q] Ca. Temp. Talbot, 227.

plied will not alter its nature; as where it is directed to be laid out in land [r]. Perſonal annuities given by will, are alſo general legacies [s].

[r] 1 P. Wms. 540.

[s] 3 Atk. 693. 2 Veſ. 417. 2 Fonbl. 378.

In a caſe before Lord Camden C. his lordſhip took the diſtinction between a legacy of a certain ſum due from a particular perſon, and a legacy of ſuch debt generally, conſidering the former as a legacy of quantity, the latter as ſpecific [t]. So, in another caſe, where, after the following bequeſt, "I give to A. one thouſand four hundred "pounds, for which I have ſold my eſtate this "day;" the teſtator received the whole of that ſum, paid it into his banker's, and drew out one thouſand one hundred pounds of the money; this was alſo held by Lord Bathurſt C. to be a legacy of quantity [u]. But Lord Thurlow C. diſallowed that diſtinction [w]; and held a legacy of "the principal "of A.'s bond for three thouſand five hundred "pounds," to be a ſpecific legacy, notwithſtanding the ſum was named.

[t] 2 P. Wms. 330. not. 1. Ambl. 566.

[u] Carteret v. Carteret, cited 2 Bro. Ch. Rep. 114.

[w] Aſhburner v. Macguire, 2 Bro. Ch. Rep. 113, 114.

Such are the different ſpecies of legacies. They are next to be conſidered as lapſed, or veſted. It is a general rule, that if a legatee die before the teſtator, the legacy ſhall be lapſed [x]. And although in the bequeſt of a legacy to A. the teſtator ſhould expreſs an intention, that the legacy ſhould not lapſe in caſe A. die before him, this is not ſufficient to exclude the next of kin [y]. Yet a bequeſt may be ſo ſpecially framed, as to prevent its lapſe on ſuch previous death of the legatee, as if in caſe of the

[x] 4 Bac. Abr. 387. 2 Fonbl. 368. not. (g).

[y] 3 Atk. 572.

the death of A. before the teſtator other perſons are named to take; the legacy on A.'s ſo dying ſhall veſt in ſuch nominees [z]. Nor is a legacy to two or more within the rule; for it is ſettled, that a legacy to ſeveral perſons is not extinguiſhed by the death of one of them, but ſhall veſt in the ſurvivor [a]. Nor does the rule extend to a legacy given over after the death of the firſt legatee, for in ſuch caſe the legatee in remainder ſhall have it immediately [b]. Nor, as it ſeems, will a legacy lapſe by the death of the legatee in the teſtator's life-time, if he is to take in the character of truſtee [c].

[z] 3 Atk. 572. See alſo 3 Atk. 580.

[a] Gilb. Rep. 137. 2 Atk. 220.

[b] 1 And. 33. pl. 81. 2 Vern. 207. 1 P. Wms. 274. 2 P. Wms. 328. 3 P. Wms. 315. Prec. Ch. 37. Moſely 319. 2 Vern. 378. 2 Fonbl. 368. not. (g.)

A legacy is alſo lapſed, if, before the condition on which it is given by the will be performed, the legatee die, or if he die before it is veſted in intereſt [d].

[c] See 1 Veſ. 140. 2 Vern. 468. 2 Fonbl. 369. not. (z). & (b).

[d] 2 Fonbl. 368. 4 Bac. Abr. 410.

We have already ſeen, that if a legacy be left to A. *payable* to him at a certain age, it is a veſted and tranſmiſſible intereſt in him, *debitum in præſenti*, though *ſolvendum in futuro*: That it is otherwiſe, if the legacy be left to him at, or when he attains ſuch age [e]. The diſtinction was borrowed from the civil law, and adopted by our courts, not ſo much from its intrinſic equity, as from its prevailing in the ſpiritual courts; for, ſince the chancery, as will be hereafter ſhewn, has a concurrent juriſdiction with them in reſpect to the recovery of legacies, it is reaſonable, that there ſhould be a conformity in their deciſions; and that the ſubject ſhould have the ſame meaſure of juſtice, to whatſoever court he may

[e] Vid. ſupr. 131, 132. 366 2 Fonbl 371. not. (k). 2 Ventr. 342. 2 Ch. Ca. 155. 1 Vern. 462. 3 P. Wms. 138. 2 Vern 199. 2 Ventr. 342. 2 Salk 415. 1 Bro. Ch. Rep. 119.

may reſort. But if ſuch legacies be charged on a real eſtate, in either caſe they ſhall equally lapſe for the benefit of the heir; for with regard to deviſes affecting lands, the eccleſiaſtical courts have no concurrent juriſdiction, and therefore the diſtinction does not extend to them [f]. If, as I have before ſtated, the legacy be made to carry intereſt, though the words, "to be paid," or "payable," are omitted, it is veſted, and tranſmiſſible [g]. So if the bequeſt be to A. for life, and, after the death of A., to B., the bequeſt to B. is veſted, on the death of the teſtator, and will not lapſe by the death of B. in the life-time of A. [h].

[f] 4 Bac. Abr. 393. 2 Bl. Com. 513. 1 Eq. Ca. Abr. 295. 2 P. Wms. 601. 2 Fonbl. 373. not. (m).

[g] 2 Fonbl. 371. not. (k). 2 Ventr. 342. 2 Chan. Ca. 155. 2 Vern. 673. 2 Vef. 263. 3 Atk. 645.

[h] 2 Fonbl. 367. not. (k). 2 Ventr. 347. 1 P. Wms. 566. 2 Vern. 378. Ambl. 167. 1 Bro. Ch. Rep. 119. 181.

SECT. II.

Of the executor's aſſent to a legacy—On what principle neceſſary—What ſhall amount to ſuch aſſent—Aſſent expreſs, or implied—abſolute, or conditional—has relation to the teſtator's death—when once made irrevocable—when incapable of being made.

BUT the bequeſt of a legacy, whether it be general, or ſpecific, transfers only an inchoate property to the legatee. To render it complete, and perfect, the aſſent of the executor is requiſite [a]. On him all the teſtator's perſonal property is devolved, to be applied, in the firſt place, to the payment of debts; and therefore, before he can pay legacies

[a] 3 Bac. Abr. 84. 2 Bl. Com. 512. Hargr. Co Litt. 111. Aleyn. 89.

with safety, he is bound to see, whether, independently of them, a fund has been left sufficient for the demands of creditors.

In case the assets prove inadequate, the legacies must abate or fail altogether, according to the extent of the deficiency. If, on a failure of assets, he pay legacies, he makes himself personally responsible for the debts to the amount of such legacies. Hence, as a protection to the executor, the law imposes the necessity of his assent to a legacy, before it can be absolutely vested; and such assent when once given, is considered as evidence of assets, and an admission on the part of the executor, that the fund is competent [b].

[b] Off. Ex. 27, 28.

If without the assent of the executor the legatee take possession of the thing bequeathed, the executor may maintain an action of trespass against him [c]. Nor even, in case a specific legacy, whether a chattel real or personal, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, has he a right to retain it in opposition to the executor, by whom in such case an action will lie to recover it [d]. Nor has such legatee authority to take possession of the legacy without the executor's assent; although the testator by his will expressly direct that he shall do so: for if this were permitted, a testator might appoint all his effects to be thus taken in fraud of his creditors [e]. Yet, previous to the assent of the executor, a legatee has such an interest in the thing bequeathed,

[c] Off Ex. 27. 223. 3 Bac. Abr. 84. 4 Bac. Abr. 444. 1 yer 254. Keilw. 128.

[d] Off. Ex. 222, 223.

[e] Off. Ex. 223.

queathed, as that in case of his death, before it be paid, or delivered, it shall go to his representative [f], or, in case of the outlawry of the legatee, shall be subject to the forfeiture [g].

[f] Off. Ex. 28.

[g] Vid. Off. Ex. 29.

If A. release by will a debt due to him from B., it is the better opinion, that the assent of the executor is necessary to give effect to the testator's intention: for, although on the one hand it may be alleged, that the party to whom the debt is bequeathed, must necessarily have it by way of retainer, and that such a clause operates rather as an extinguishment, than as a donation, and therefore that it needs no such assent as where there is to be a transfer of the property: yet on the other hand, a debt so released is regarded, with greater reason, in the light of a legacy, and like other legacies, not to be sanctioned by the executor, in case the estate be insufficient for the payment of debts. But as soon as the executor assents, and not before, it shall be effectually discharged [h].

[h] Off. Ex. 29, 30. 2 P. Wms. 332. Vid. 1 P. Wms. 83. 3 Atk. 580.

With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form; a very slight assent is held sufficient [i]. It may be either express, or implied, absolute, or conditional.

[i] 1 Vern. 94, 460. 2 Ventr. 358. 4 Bac. Abr. 445.

The executor may not only in direct terms authorise the legatee to take possession of the legacy, but his concurrence may be inferred either from indirect expressions, or particular acts. And such

conſtructive permiſſion ſhall be equally available. Thus, for inſtance, if the executor congratulate the legatee on his legacy, or if a horſe is bequeathed to A., and the executor requeſts him to diſpoſe of it, or if B. propoſes to purchaſe the horſe of the executor, and he directs B. to buy it of A.; or if the executor himſelf purchaſe the horſe of A., or merely offer him money for it, this in either caſe amounts to an aſſent by implication to the legacy [k]. So, where A. the deviſee of a term granted it to the executor, his acceptance of the grant from A. was held to be an implied permiſſion that the term ſhould be A.'s to grant [l]. So, where J. S. ſeiſed in fee of a foreign plantation, deviſed it to A., and the executor granted a leaſe of it for years, reſerving rent in truſt for A., this was adjudged a ſufficient aſſent [m].

[k] 4 Bac. Abr. 445. Off. Ex. 226. Com. Dig. Admon. C. 6.

[l] Off. Ex. 226.

[m] 2 Ventr. 358.

If a term be deviſed to A. for life, remainder to B., the aſſent of the executor to the deviſe to A. ſhall operate as an aſſent to the deviſe over to B., and veſt an intereſt in him accordingly [n]. So, an aſſent to ſuch eſtate in remainder is an aſſent to the preſent eſtate [o]: For the particular eſtate and the remainder, conſtitute but one eſtate [p]. But if a leſſee bequeath a rent to A., and the land to B., the executor's aſſent that A. ſhould have the rent, is no aſſent that B. ſhould have the land, becauſe the rent and the land are diſtinct legacies; but under ſpecial circumſtances, an executor's aſſent to one legacy may enure to another, as if the caſe laſt mentioned be reverſed: The executor's aſſent that B. ſhould

[n] Com. Dig. Admon. C. 6. 10 Co. 47. b. 1 Roll. Abr. 620. Plowd. 545. in not. 3 P. Wms. 12.

[o] Com. Dig. Admon. C. 6.

[p] Off. Ex. 236.

B. ſhould have the land, ſeems to imply his aſſent that A. ſhould have the rent; for the neceſſity of the executor's aſſent is eſtabliſhed with a view to creditors; now to them the land is equally unproductive, whether it paſſes to B. charged with the rent, or not: and alſo, as it was the teſtator's intention, that B. ſhould hold the land ſubject to the rent to A., the executor's aſſent to B.'s having the land ſhall, in conformity to the will, be conſtrued an aſſent to the legacy to A. [q]. So an aſſent to a deviſe of a leaſe for years, is an aſſent to a condition or contingency annexed to it. As, if there be a deviſe of a term to the teſtator's widow, ſo long as ſhe continues unmarried; and if ſhe marry, then of a rent payable out of the land; the executor's aſſent to the deviſe of the term, is an aſſent to that of the rent in caſe of the deviſee's marriage [r].

[q] Off. Ex. 237.

[r] Com. Dig. Admon. C. 6. 1 Roll. Abr. 620.

An aſſent may alſo be abſolute, or conditional. If it be of the latter deſcription, the condition muſt be precedent. As, where the executor aſſents to the deviſe of a term, if the deviſee will pay the rent in arrear at the teſtator's death. In that caſe, if the condition be not performed, there is no aſſent; but if the aſſent be on a condition ſubſequent, as provided the legatee will pay the executor a certain ſum annually; ſuch condition is void, and a failure in performing it ſhall not diveſt the legatee of his legacy [s]. The ſtate of the fund may require the executor to impoſe a condition precedent to his payment of the legacy; but if he once part with it, he has no right to clog it with future ſtipula-

[s] Com. Dig. Admon. C. 8. Off. Ex. 238. 4 Bac. Abr. 445. Leon. 130, 131.

tions; and make that legacy conditional, which the testator gave absolutely [t].

[t] Off. Ex. 238.

The assent of an executor shall have relation to the time of the testator's death. Hence, if A. devise to B. his term of years in tithes, in an advowson, or in a house or land, and after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the undertenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests [u]. So such assent shall by relation confirm an intermediate grant by the legatee of his legacy [w].

[u] Off. Ex. 249.

[w] Off. Ex. 250.

If an executor once assent to a legacy, he can never afterwards retract, and, notwithstanding a subsequent dissent, the legatee has a right to take the legacy [x].

[x] Off Ex. 227. 4 Bac. Abr. 445.

If a term is devised to A., and the executor before he assents to the devise takes a new lease of the same land to himself for a larger term in possession, or to commence immediately, the term devised is merged, so that it cannot pass to A. although the executor should afterwards assent [y]. An assent to a void legacy, is also void [z].

[y] Off. Ex. 228.

[z] Plowd. 526.

Such is the nature of an executor's assent to a legacy. We have already seen, that he is competent to give it before probate [a]. But if he has not attained the age of twenty-one years, he is incapable, by the abovementioned stat. 38 *Geo.* 3. *c.* 87.

[a] Vid. supr 24.

c. 87 [b]. of the functions of an executor, and therefore his aſſent is of no validity [c].

[b] Supr. 12.

[c] Vid. Com. Dig. Admon. E. Off. Ex. 224.

SECT. III.

When a legacy is to be paid—To whom—Of payment in the caſe of infant legatees—Of a conditional payment of a legacy—Of payment of intereſt on legacies—Of ſuch payment where the legatees are infants—Of the rate of intereſt payable on legacies.

ON the ſame principle that the aſſent of an executor to a legacy is neceſſary, he cannot before a competent time has elapſed be compelled to pay it. The period fixed by the civil law for that purpoſe, which our courts have alſo preſcribed, and which is analogous to the ſtatute of diſtributions, (as will be hereafter ſeen), is a year from the teſtator's death, during which it is preſumed he may fully inform himſelf of the ſtate of the property [a].

[a] 4 Bac. Abr. 434. 2 Salk. 415. pl. 2.

If a legacy to an infant be payable at twenty-one, and he die before, his repreſentative cannot claim it till, in caſe he had lived, he would have come of age [b]; unleſs it be payable with intereſt, and then, as we have ſeen, ſuch repreſentative has a right immediately to receive it [c]. In caſe a legacy be left to A. at twenty-one, and if he die before twenty-one, then to B.; and A. die before he attains that age, B. ſhall be entitled to the legacy immediately; for

[b] 2 Vern. 51. 199. 283.

[c] 4 Bac. Abr. 434. in not. 1 Stra. 238. 2 P. Wms. 317. 480. Ambl. 588. 1 Veſ. 118. 1 Bro. Ch. Rep. 105. 1 Veſ. 307. 3 Veſ. jun. 10. Vid. ſupr. 131.

he does not claim under A., but the deviſe over is a diſtinct, ſubſtantive bequeſt, to take effect on the contingency of A.'s dying during his minority [d].

[d] 1 Eq. Ca. Abr. 299, 300.

But where legacies were given to A. B. and C., the three co-heireſſes of the teſtator, to be paid at their reſpective marriages, and if either of them ſhould die, her legacy to go to the ſurvivors, and one of them died unmarried; it was held, that the ſurvivors ſhould not receive the legacy of the deceaſed before their reſpective marriages: for the condition, though not repeated, was annexed to the whole, whether it accrued by ſurvivorſhip, or by the original deviſe [e].

[e] 2 Vern. 620.

The next object of enquiry is, to whom a legacy ſhall be paid: And here the executor muſt be careful to pay it into that hand, which has authority to receive it.

It is a general rule, that he has no right to pay it to the father, or any other relation of an infant, without the ſanction of a court of equity [f]; and even in the caſe of an adult child, ſuch payment is not good, unleſs it be made by the conſent of the child, or be confirmed by his ſubſequent ratification [g].

[f] 4 Bac. Abr. 429. 1 Chan. Ca. 245.

[g] 4 Bac. Abr. 431. 3 Bro. Ch. Rep. 97.

Caſes occur, where an executor has, with the moſt honeſt intentions, paid the legacy to the father of the infant, and has been held liable to pay it over again to the legatee on his coming of age.

And although ſuch caſes have been attended with many circumſtances of hardſhip in reſpect to the executor, yet he has been held reſponſible, on the policy of obviating a practice ſo dangerous to the intereſt of infants, and ſo naturally productive of domeſtic diſcord. The child muſt in caſe of ſuch payment either acquieſce, or reſort to the father; or, which is in effect the ſame, inſtitute a ſuit againſt the executor, who will of courſe require the father to refund [h]. Thus legacies of one hundred pounds a-piece, were bequeathed to four infants; the executor paid the legacies to the father, and took his receipt for them: When one of the legatees came of age, who was about ten years old at the time of payment, the father told him, that he had ſuch a legacy of his in his hands, but could not pay it immediately, and requeſted him not to apply to the executor, at the ſame time promiſing, that he would himſelf pay it: The ſon acquieſced for fourteen, or fifteen years, during which period his father and he carried on a joint trade, and then became bankrupts: On a commiſſion taken out againſt the ſon, this legacy among other things was aſſigned for the benefit of his creditors; and the aſſignee filed a bill againſt the executor, for an account and payment of the legacy, when it was decreed accordingly by the Maſter of the Rolls, but without intereſt; and the decree affirmed by the Lord Chancellor on an appeal. His lordſhip, however, on the hardſhip of the caſe, ordered the depoſit to be divided [i]. It appears from the regiſtrar's book, that in the above caſe evidence was read,

[h] 1 Eq. Ca. Abr. 300. 3 Bro. Ch. Rep. 96 4 Burn Eccl. L. 321. 3 Ch. Ca. 168.

[i] 1 Eq. Ca. Abr. 300. 1 P. Wms. 285. S. C. G lb. Rep. 101. S. C. 4 Burn Eccl. L. 321. S. C. Vid. alſo 3 Bro. Ch. Rep. 96.

read, that the teſtator on his death-bed gave direction, that the executor ſhould pay the legacies to the father of the infants, that he might improve the money for their benefit [k]. But although that circumſtance, if true, rendered the caſe ſtill harder, yet it could not influence the deciſion, ſince the evidence ought not to have been received. It were dangerous to admit proof, that a legacy given to one perſon was ordered to be paid to another [l]. If the direction had appeared on the face of the will, the decree, doubtleſs, would have been different [m]. So, where A. left a legacy of a hundred pounds to each of the three children of B., and appointed C. her executor, leaving him the bulk of her eſtate, provided he paid thoſe three legacies within a year after her death: The defendant within that period paid into the children's own hands their ſeveral legacies; the eldeſt of whom was then ſixteen years, the ſecond fourteen, and the youngeſt only nine: On her coming of age, they filed their bill againſt the executor to be paid their reſpective legacies; ſuggeſting that their father had embezzled the money, and was inſolvent, and that the payment was a fraud: The defendant in his anſwer denied all knowledge of the money's ever having come to the father's hands; The Lord Chancellor held, at firſt, that as the executor paid theſe legacies to ſave a forfeiture of what he himſelf took under the will, he ought not to pay them over again; but on farther conſideration, conceiving the point to be very doubtful, his lordſhip recommended a compromiſe; and the defendant agreeing to

[k] 1 P. Wms. 285 in not. 3 Bro. Ch. Rep. 96.

[l] 3 Bro. Ch. Rep. 96. Vid. 2 P. Wms. 421.

[m] Vid. infr. 249.

to pay fifty pounds, to be divided between the three plaintiffs, without coſts on either ſide, they were ordered to releaſe their legacies [n].

[n] 2 Atk. 80, 81.

The rule, however, is not ſo harſh; as that in all poſſible caſes an executor ſhall be liable to pay over again legacies of infants which he ſhall have paid to their parents [o]. Thus, where A. bequeathed to J. S. a hundred pounds to be equally divided between himſelf and his family, the executrix paid the legacy to J. S. who had a wife, and ſeven children, ſix of whom were adults, and the ſeventh an infant: Eleven years after the youngeſt had come of age, and the legacy never having been demanded, they filed their bill againſt the executrix for the ſame, inſiſting that the payment to their father was invalid: It was held, that, according to the terms of the will, the legacy was properly paid to J. S.; and that it belonged to him as truſtee to divide it: And even on ſuppoſition, that the payment was wrong, the great laches, and long acquieſcence of the plaintiffs, precluded them from all remedy [p]. But where A. bequeathed his perſonal eſtate to truſtees in truſt, to pay ſix hundred pounds to an infant, and directed, that ſuch of his legatees as might be infants at the time of his deceaſe, ſhould receive intereſt at the rate of five *per cent.* till their reſpective legacies ſhould be paid, namely, at their age of twenty-one years; it was holden, that the executors could not juſtify paying any part of the principal to the infant, or to his uſe, before that time, except for abſolute neceſſaries [q].

[o] 2 Atk. 81.

[p] Cooper v. Thornton, 3 Bro. Ch. Rep. 96.

[q] 4 Bac. Abr. 432. Davies v. Auſten. 3 Bro. Ch. Rep. 178.

In

In cafe a legacy be too inconfiderable in point of value, to bear the expence of an application to the court of chancery, it feems an executor will be juſtified in paying it into the hands of the infant, or, which amounts to the ſame thing, to the father [r]; but in general he is not warranted in ſo doing, unleſs he be clearly authoriſed by the will. And if a ſuit be inſtituted in the ſpiritual court for an infant's legacy by the father, to have it paid into his hands, an injunction [s], or prohibition [t], will be granted.

[r] 4 Burn Eccl. L. 321. 1 Ch. Ca. 245. 2 Atk. 81. Com. Dig. Chancery, (3 G. 6.) Vid. 2 Bro. Ch. Rep. 613.

[s] 3 Atk. 629. Per Lord Hardwicke C. arguendo.

[t] 4 Bac. Abr. 429. in not. Godb. 243.

If an executor have a general power to divide a ſum of money among children at his diſcretion, and he make an unreaſonable diſpoſition, it will be controlled in a court of equity [u]. As, where A. having two daughters; one by a former marriage, and the other by a ſecond, deviſed his eſtate to his wife, to be diſtributed between his daughters as ſhe ſhould think fit, and ſhe gave a thouſand pounds to her own daughter, and only a hundred to the other, an equal diſtribution was decreed [w]. In like manner where A. having appointed his two daughters his executrices, gave them four hundred pounds to be diſtributed among themſelves, and their brothers and ſiſters, according to their neceſſity, as the executrices, in their diſcretion, ſhould think fit, the court ſettled the diſtribution, and decreed a double ſhare to one of the children, as ſtanding in greater need of it [x].

[u] 4 Bac. Abr. 340. 2 Vern. 513. 2 Vef. 640. Ca. Temp. Talb. 72.

[w] 1 Vern. 355.

[x] 2 Vern. 421.

If

If a legacy be given to a married woman, it must be paid to the husband. So where a legacy was given to a married woman living separate from her husband with no maintenance, and the executor paid it to the wife, and took her receipt for it, yet on a suit instituted by the husband against the executor, he was decreed to pay it over again, with interest [y]. It hath also been adjudged, that if the husband and wife are divorced, *à mensâ et thoro*, and a legacy is left to her, the husband alone may release it [z], and consequently to him alone it is payable. But the executor, in cases where the husband has made no provision for the wife, may decline paying such legacy, unless he will make an adequate settlement on her. Nor will the court of chancery interpose in his favour, but on the same terms [a]; unless the wife appear in court, and consent to his receiving it [b].

[y] 1 Vern. 261. 4 Burn Eccl. L. 332.

[z] 4 Bac. Abr. 433. 1 Roll. Abr. 343. 2 Roll. Abr. 301. Moore, 665. 683. Cro. Eliz. 908. Noy 45. 1 Roll. Rep. 426. 3 Bulf. 264. Salk. 115. pl. 4. Ld. Raym. 73. 5 Mod. 69. 12 Mod. 891.

[a] 2 P. Wms. 639. 3 P. Wms. 11. 202.

[b] 2 Atk. 67. 2 P. Wms. 641. 2 Vef. 60. Sed vid. 2 Vef. 579.

If a legacy be left to the senior six clerk, to be divided between himself, and the other six clerks, it seems that it ought to be paid to the senior, and that it would not be incumbent on the executor to make any enquiry respecting the others [c].

[c] Per M. R. arguendo. 3 Bro. Ch. Rep. 99.

It may be unsafe for an executor, under certain circumstances, to make an absolute payment, or delivery of a legacy, and in such case it is advisable for him to pay or deliver it conditionally, and to take security of the legatee, in an event specified, to refund [d]. As, if A. bind himself in an obligation for performance of a particular act, and bequeath divers legacies,

[d] 4 Burn Eccl. L. 332. 2 Ventr. 358.

legacies, and die, leaving only ſufficient to ſatisfy the bond in caſe of forfeiture; yet the bond ſhall not hinder the payment of the legacies, becauſe it is uncertain whether it will ever be forfeited; but, in ſuch caſe, the executor ſhall pay the legacy, on condition that, if judgment be recovered againſt him on the bond, the legatee ſhall refund [e]. And if a ſuit be inſtituted in the ſpiritual court to compel him to pay the legacy, without a ſecurity to that effect, a prohibition ſhall iſſue [f]. Formerly, indeed, in all caſes, an executor might oblige legatees to give ſecurity to refund, in caſe of a deficiency of aſſets [g]; but that practice no longer exiſts. On a bill for the payment of a legacy, the court of chancery, in general, will not require ſuch ſecurity [h]. Equity will compel a legatee to refund, where the eſtate proves inſufficient, whether ſecurity has been given for ſuch a purpoſe or not [i].

[e] 3 Bac. Abr. 84. 1 Roll Abr 928. Vid. ſupr. 222.

[f] 2 Ventr. 358. 1 Vern. 93.

[g] 4 Burn Eccl. L. 333, 334. 1 Chan. Ca. 149.

[h] 1 Atk. 491.

[i] 1 Vern. 93, 94.

In regard to the payment of intereſt on a legacy, in caſe of a veſted legacy charged on lands yielding immediate profits, and no time of payment mentioned in the will, intereſt ſhall, in reſpect of ſuch profits, be payable from the death of the teſtator [k]. If a legacy be given out of a perſonal eſtate, conſiſting of mortgages bearing intereſt, or of money in the public funds, the dividends of which are paid half-yearly, in theſe caſes, the legacy, for the ſame reaſon, ſhall carry intereſt from the ſame period [l]. But, if a legacy be given generally out of the perſonal eſtate, and no time of payment be ſpecified by the teſtator,

[k] 4 Bac. Abr. 439. 2 P. Wms. 26. 2 Bl. Com. 513.

[l] 2 P. Wms. 26. and not. 2. 2 Atk. 108. 1 Veſ 308. Bunb. 240. and 3 P. Wms. 253.

teſtator, ſuch legacy ſhall carry intereſt only from the expiration of the year next after his deceaſe; for the executor may be reaſonably allowed that time for the collecting of the effects [m]. If a legacy be given, charged on a dry reverſion, it ſhall carry intereſt from a year next after the death of the teſtator, inaſmuch as a year is a competent time for a ſale [n]. Intereſt on a ſpecific legacy, where it produces intereſt, ſhall be computed from the time of the teſtator's death. It is ſevered from the reſt of his eſtate, and ſpecifically appropriated for the benefit of the legatee, and ſhall, therefore, carry intereſt immediately [o].

[m] 2 P. Wms. 26. 2 Atk 108.

[n] 2 P. Wms. 26.

[o] 1 Atk. 502. 2 Veſ. 563.

If a legacy, whether veſted or not, be payable on a certain day, and the will be ſilent in reſpect to intereſt, it is a general rule, the intereſt ſhall commence only from that time; for it is given for delay of payment, and, conſequently, till the day of payment arrives, no intereſt can accrue to the legatee [p]. Hence, as we have ſeen [q], if a legacy be left to A. to be paid at twenty-one, and he die before, his repreſentative ſhall wait till he would have attained that age, unleſs it were made payable with intereſt. Nor is it, in ſuch caſes, a queſtion of conſtruction, as whether the payment is ſuſpended on account of the imbecility of the party, or with a view to the benefit of the eſtate. The rule I have juſt ſtated is technical, eſtabliſhed in the eccleſiaſtical court, and adopted by the court of chancery in numerous adjudications [r].

[p] 3 Atk. 716. 1 Veſ. 307. 2 Salk. 415. pl. 2. 2 P. Wms. 481. not. 1. 1 Bro. Ch. Rep. 105. 3 Veſ. jun. 10. 4 Veſ jun. 1.

[q] Supr. 131. 245.

[r] 4 Veſ jun. 3, 4, 5.

But

But the principle does not extend to all cafes: It does not apply where the legatee was the child of the teftator: There the court will not poftpone the payment of intereft, even till a year after the death of the parent, but will order it immediately; fince, by the law of nature, he was obliged to provide not only a future but a prefent maintenance for his child, and fhall not be prefumed to have meant to leave him deftitute [a].

[a] 1 Atk. 60. 3 Vef. jun. 13.

Whether a legatee, if a natural child, be alfo comprifed within the exception, is not fo clear. Lord Hardwicke C. expreffed an opinion in the negative, as well on the principle of law, which recognifes no relationfhip in fuch a child, as alfo on the general policy of encouraging marriage, and difcountenancing immorality [b]. But, in a recent cafe, the Mafter of the Rolls intimated, that illegitimate children were to be admitted to the fame benefit [c]. Whether a grand-child fhall be thus favoured, is a point likewife on which there has been a difference of opinion: fuch advantage has been, in feveral inftances, denied to him [d]. But his honour, in the cafe juft alluded to, appears to have confidered him as on the fame footing with a child [e]. A legacy to a nephew, payable at twenty-one, is clearly comprehended under the general rule, and fhall carry intereft only from the time of payment [f]. But the rule is not applicable to a bequeft of a refidue, fubject to be divefted on a contingency; for it would be abfurd to

[b] 1 Vef. 310.

[c] 3 Vef. jun. 12.

[d] 2 Atk. 330. 3 Atk. 59. 4 Bro. Ch. Rep. 249. in not.

[e] 3 Vef. jun. 12.

[f] 3 Vef. jun. 12.

to say the testator meant to die intestate as to the produce, when he has given a vested interest in the capital [g]. If a legacy be left to an infant, payable at twenty-one, and devised over on his dying before he attains that age, and such event happens, the interest, accumulated from the death of the testator to that of the infant, shall go to his representative, and not to the remainder-man [h].

[g] 2 P. Wms. 420. Vid. 4 Ves. jun. 4.

[h] 1 P. Wms. 500. 2 P. Wms. 421. not. 1. 2 Atk. 473. 1 Bro. Ch. Rep. 82. ibid. 325. Ambl. 448. Vid. 3 Atk. 59.

If the father of an infant legatee be living, he is bound by the municipal law, as well as by the ties of nature, to maintain his child. Nor, as it has been frequently held, shall the interest of the legacy be applied to that purpose, unless in cases of great necessity, arising from the distressed and embarrassed circumstances of the parent [i]. In cases so pressing the infant shall be maintained out of the interest of the legacy, whether it be vested or contingent, and, although the legacy be devised over on the infant's dying before he attains twenty-one [k]. Indeed, in some recent instances, where the will has contained an express direction for maintenance of the legatees, out of the interest of the legacies, and there have been other children, not the objects of the testator's bounty, such maintenance has been ordered without regard to the father's ability [l].

[i] 3 Atk. 60. Vid. 2 Bro. Ch. Rep. 60.

[k] 3 Atk 60. 2 P. Wms. 21.

[l] 3 Ves. jun. 733. Vid. also 4 Bro. Ch. Rep. 223.

On occasions extremely urgent, the court will even break in upon the principal; but this authority is exercised very sparingly, and with great caution [m]. If the legacy be of small amount, and

[m] 2 P. Wms. 21.

the intereſt altogether inadequate to the neceſſities of the infant, the court will order a part of the principal to be immediately paid, and that as well for his education, as for his maintenance [n]. But if the legacy be deviſed over in caſe of the infant's dying before he comes of age, the principal, it ſeems, ſhall on no account be ſubject to ſuch diminution [o].

[n] 1 Vern. 255. 2 P. Wms. 21.

[o] 4 Bac. Abr. 442. 1 Ch. Ca. 249. Prec. Ch. 195.

With reſpect to the *quantum* of the intereſt thus payable on a legacy, a diſtinction formerly prevailed between legacies charged on land, and ſuch as were charged on the perſonal eſtate. It has been held, that as land never produces profit equal to the intereſt of money, the court of chancery will follow the courſe of things, and give intereſt, where it ariſes from land, one *per cent.* lower than where it ariſes from perſonal property [p]; but this diſtinction is now exploded. Whether legacies are charged on real or on perſonal eſtate, it is become the eſtabliſhed practice to allow only four *per cent.* where no other rate of intereſt is ſpecified by the will. And although pecuniary legacies not having the addition of the word "ſterling," are to be paid according to the currency of the country where the will was made, yet the intereſt is to be computed, in conformity to the courſe of the court, at four *per cent.* and not purſuant to the rate of intereſt in ſuch country [q].

[p] 1 Veſ. 308, 309.

[q] 2 Bro. Ch. Rep. 47. 3 Bro. Ch. Rep. 53. 4 Bac. Abr. 449. in not.

On the payment of a legacy an executor is bound to take a receipt for the ſame, properly ſtamped,

according to the value of the legacy, and the relationſhip of the legatee [r].

[r] Vid. Append.

SECT. IV.

Of the ademption of a legacy.

I PROCEED now to enquire into the nature of an ademption of a legacy.

An ademption of a legacy is the taking away or revocation of it by the teſtator. It may be either expreſs, or implied. The teſtator may not only in terms revoke a legacy he had before given, but ſuch intention may be alſo indicated by particular acts [a]. As where a father makes a proviſion for a child by his will, and afterwards gives to ſuch child, if a daughter, a portion in marriage, or if a ſon, a ſum of money to eſtabliſh him in life, provided ſuch portion or ſum of money be equal to or greater than the legacy, this is an implied ademption of it, for the law will not intend that the father deſigned two portions for the ſame child [b]. But this implication will not ariſe if the proviſion in the will is created by a bequeſt of the reſidue [c], nor if the proviſion in the father's life-time be ſubject to a contingency [d], nor unleſs it be *ejuſdem generis* with the legacy [e]; nor if the teſtator were a ſtranger [f]. Such implication is always liable to be rebutted by evidence [g]. But if the teſtator by a codicil,

[a] 2 Fonbl. 353.

[b] 2 Fonbl. 354. not. (a.) 1 P. Wms. 680. 2 Ch. Rep. 85. 2 Vern. 115. 2 Vern. 257. 2 Atk. 216. Ambl. 325. 2 Bro. Ch. Rep. 307.

[c] 2 Atk. 216.

[d] 2 Atk. 491.

[e] 1 Bro. Ch. Rep 425.

[f] 2 Atk. 516. 2 Bro. Ch. Rep. 499.

[g] 2 Atk. 516. 2 Bro. Ch Rep. 165. 519.

codicil, ſubſequent to the portioning or advancement of the child, ratify and confirm his will, this, although a new publication, ſhall not avail to overturn the preſumption that he meant to adeem the legacy; for ſuch words are merely formal [h].

[h] 2 Freem. 224.

In reſpect to the ademption of a legacy, all the caſes on the ſubject concur in the principle, that the intention of the teſtator muſt govern; but, in the application of that principle, or what ſhall amount to evidence of ſuch an intention, they are, in many inſtances, incapable of being reconciled.

Thus, in ſome caſes, it has been held, that, where a ſum of money is bequeathed out of a particular fund, ſuch legacy is in its nature general, a *legatum in numeratis*, and, if the teſtator in his life-time receive it, it muſt be made good to the legatee out of the general aſſets; for, from that act of the teſtator, no preſumption can be raiſed of his intention to revoke his bounty [i]. In other caſes it has been decided, that ſuch a legacy under the ſame circumſtances is adeemed [k]. Some authorities diſtinguiſh between the bequeſt of a ſum of money, to be ſatisfied out of a particular fund, and conſequently a general legacy, and a bequeſt of a ſpecific debt, that the former is not adeemed, while the latter is adeemed, by payment to the teſtator [l]. But theſe laſt mentioned caſes differ in their conſtruction of what ſhall be the bequeſt of a general legacy, as oppoſed to that of a ſpecific debt.

[i] 4 Bac. Abr. 355. 2 Bro. Ch. Rep. 108. Finch. 152. Raym. 335. 2 P. Wms. 777.

[k] 3 Bro. Ch. Rep. 431. See alſo 2 Fonbl. 367. not (f).

[l] Ambl. 401.

debt. Some, as we have already seen [m], adopt a distinction between the bequest of a certain sum of money due from a particular person, as "five hundred pounds due on a bond from A.," and a bequest of such debt generally, as, "of the bond from A.;" that, in the former instance, the legacy is pecuniary, in the latter is specific [n]. But, according to other cases, this distinction is too slender to be relied on [o]. A difference has also, in some instances, been taken between a compulsory and a voluntary payment to the testator of such debt; in other words, where the testator himself calls in a debt, which he has bequeathed, and where the debtor, unprovoked and without application, thinks fit to pay it; that, in the former instance, it is the act of the testator, and consequently an ademption, in the latter he is merely passive, and, therefore, cannot be presumed to have changed his mind [p]. But the doctrine of some cases is, that this distinction has no weight [q], and of others, that it has no existence [r], and that the case is not varied by the mode of payment. In another class of cases, this distinction between a compulsory and a voluntary payment has been recognised as very important, but not as an absolute rule of decision, on the principle, that the testator's calling for payment is not of itself sufficient evidence of an intention to adeem, but an equivocal act requiring explanation [s].

[m] Vid. supr. 237.

[n] 2 P. Wms. 330. and not. 1. ibid. Ambl. 566. Carteret v. Lord Carteret, cited 2 Bro. Ch. Rep. 114.

[o] 2 Bro. Ch. Rep. 111. 1 Eq. Ca. Abr.

[p] 2 P. Wms. 330. not. (1.) ibid. Ambl. 57.

[q] 1 P. Wms. 461. 3 P. Wms. 386. 2 P. Wms. 469. 2 Str. 825.

[r] Ambl. 566. 2 Bro. Ch. Rep. 109. 4 Bac. Abr. 355. not. (b.)

[s] 2 Vef. 623. Ambl. 401. 2 Vef. jun. 639.

It is, however, clear, that if the legacy be of a specific chattel, and the testator alter the form, so

as to alter the ſpecification of the ſubject, as if, after having given a gold chain by his will, he convert it into a cup, or, after he has bequeathed wool, he make it into cloth, or a piece of cloth into a garment; the moſt obvious concluſion that can be formed from ſuch an act is, that he has changed the intention he had expreſſed in his will; therefore, in ſuch inſtances, the legacy ſhall be adeemed [t]. So, if he bequeath his ſtock in a particular fund, and ſell it out ſubſequent to the making of the will, this, on the ſame principle, amounts to an ademption [u]. But, if A. bequeath ſo much ſtock to B., and, after making his will, ſell it out, and then buy in again the ſame quantity of ſtock, this is no ademption; for, if the ſelling of the ſtock is evidence of his having altered his intention, his buying in again is evidence, equally ſtrong, that he meant the legatee ſhould have it [x]. If the teſtator, after ſuch bequeſt of ſtock, ſell out part, and die, ſuch ſale ſhall be an ademption *pro tanto* [y]. Thus where A. bequeathed a moiety of two-thirds of the reſidue of his South Sea ſtock, India, Bank, and Orphan ſtock, leaſes, Eaſt India and South Sea bonds, and other his perſonal eſtate to B.; B. before he received this legacy made his will, and deviſed this moiety to truſtees, to ſell and pay out of the ſame the ſum of two hundred pounds to C., and the reſidue of the money to D: Afterwards B. and the legatee of the other moiety coming to an account with the executor of A., their reſpective ſhares were ſet out and received, and the ſtock and bonds were allotted

[t] 3 Bro. Ch. Rep. 110.

[u] 3 Bro. Ch. Rep. 108.

[x] Ca. Temp. Talb. 226.

[y] Ca. Temp. Talb. 226.

allotted to B., who ſold part of them in his life-time, but kept no account of the produce: This was decreed to be an ademption of the legacy to D. *pro tanto.* But it was held, that B.'s receipt of his ſhare was clearly no ademption; inaſmuch as the object both of B. and the other legatee was merely to aſcertain their moieties, and to prevent ſurvivorſhip [z]. [z] Moſ. 373.

So it has been decided, that a bequeſt of a debt ſhall not be adeemed by the teſtator's receiving dividends upon it under the bankruptcy of the debtor [a]. [a] 2 Bro Ch. Rep. 108.

SECT. V.

Of cumulative legacies.

LEGACIES may be alſo cumulative: they are contradiſtinguiſhed from ſuch as are merely repeated. As where a teſtator has twice bequeathed a legacy to the ſame perſon, it becomes a queſtion, whether the legatee be entitled to both or to one only. And on this point likewiſe the intention of the teſtator is the rule of conſtruction [a]. [a] 4 Bac. Abr. 361. 1 Bro.Ch. Rep. 389. 2 Bro.Ch.Rep. 527.

On this head there are three claſſes of caſes; firſt, thoſe caſes in which there is no evidence of ſuch intention, either internal or extrinſic, one way

or the other; thoſe caſes where there is internal evidence; and alſo thoſe in which there is extrinſic evidence.

In regard to the firſt, where there is neither internal, nor extrinſic evidence, it is neceſſary to recur to the rule of law [b]. There are four inſtances of this claſs.

[b] Hooley v. Hatton, 1 Bro. Ch. Rep. 391. in not.

Where the ſame ſpecific thing is bequeathed to A. twice in the ſame will, or in the will, and again in a codicil: in that caſe he can claim the benefit only of one legacy, becauſe it could be given no more than once [c].

[c] 1 Bro. Ch. Rep. 392 in not. & ibid. 393.

Where the like quantity is bequeathed to him twice, by one and the ſame inſtrument; there alſo he ſhall be entitled to one legacy only [d].

[d] 1 Bro. Ch. Rep. 392. in not. Swinb. p. 7. f. 21. 1 Bro. Ch. Rep. 30. in not. 4 Bac. Abr. 361. 1 P. Wms. 424.

Where the bequeſt to him is of unequal quantities in the ſame inſtrument; the one is not merged in the other, but he has a right to them both [e].

[e] 1 Bro. Ch. Rep. 392. in not. Vid. 2 Bro. Ch. Rep. 521.

And, laſtly, where the bequeſt to him is of equal or unequal quantities by different inſtruments: in that caſe alſo there ſhall be an accumulation [f].

[f] 1 Bro. Ch. Rep. 391. & 392. in not. 1 P. Wms. 423. 1 Ch. Ca. 361.

There are likewiſe caſes in which there is internal evidence of the teſtator's intention; as where a latter codicil appears to be merely a copy of the former with the addition of a ſingle legacy, or where both legacies are given for the ſame cauſe: they ſhall

ſhall not be cumulative, whether given by the ſame, or different inſtruments, as they ſhall be where one is given generally, and the other for an expreſs purpoſe; or where one reaſon is aſſigned for the former, and another for the latter. In like manner it may be collected from the context, whether the teſtator meant a duplication, or a mere repetition of the firſt bequeſt. And his intention has been inferred from very ſlight circumſtances [f].

[f] 4 Bac. Abr. 361. 2 Atk. 640. 1 Bro. Ch. Rep. 389. 2 Bro. Ch. Rep. 521. 1 P. Wms. 424. not. (2.)

Extrinſic evidence is alſo admiſſible on this ſubject. Whether the teſtator by giving two legacies did, or did not, intend the legatee to take both, is a queſtion of preſumption, which will let in every ſpecies of proof [g]. Hence, if the teſtator, after the making of the will, and before the date of the codicil, had an increaſe of fortune, that circumſtance has been held to prove that he intended an additional bounty [h].

[g] 2 Bro. Ch. Rep. 527, 528. 4 Bac. Abr. 361. in not.

[h] 1 P. Wms. 424.

SECT. VI.

Of a legacy's being in ſatisfaction of a debt.

UNDER certain circumſtances, a legacy is regarded in the light of a ſatisfaction of a debt. On this point alſo, the intention of the teſtator is the criterion [a].

[a] 4 Bac. Abr. 362. 1 Salk. 155 pl. 5. 2 Salk. 508. 2 Fonbl. 332.

It

It is a general rule, that a legacy given by a debtor to his creditor, which is equal to, or greater than the debt, ſhall be conſidered as a ſatisfaction of it [b].

But this is merely a rule of conſtruction, and the courts in a variety of inſtances have denied the application of it, where they have been able to collect from the will circumſtances to repel the preſumption [c]. As where it contains an expreſs direction for the payment of debts [d], or, if the legacy be leſs than the debt, it has been held not to go in diſcharge, nor even in diminution of it [e].

Nor ſhall the legacy be a ſatisfaction, if it be conditional, or given on a contingency, for it ſhall not be ſuppoſed, that the teſtator intended an uncertain recompence in ſatisfaction of a certain demand [f]. Nor is a legacy conſidered as a ſatisfaction, where it is not equally beneficial with the debt in one reſpect, though it may be more ſo in another; as, where the legacy is to a greater amount, but the payment of it is poſtponed for however ſhort a period [g]: nor ſhall a legacy be held to be in ſatisfaction of a covenant, unleſs it be equally beneficial in amount, certainty, and time of enjoyment with the thing contracted for [h].

Nor if the debt were on an open or running account, ſo that the teſtator could not tell, whether the balance was in favour of the legatee or not [i]. Nor if the debt were contracted after the making of

[b] 1 P. Wms. 409. not. (1.) Prec. Ch. 394. 2 P. Wms. 132. 3 P. Wms. 353. 1 Veſ. 126.

[c] 1 P. Wms. 409. not. (1.)

[d] 1 P. Wms. 410. 3 Atk. 66. 68. Sed vid. Gaynor v. Wood, at the Rolls, cited 1 P. Wms. 409. not. (1.) & 4 Bac. Abr. 428.

[e] 2 Salk. 508. 2 Vern. 478. 2 P. Wms. 616. Moſ. 295.

[f] 2 Fonbl. 331. Prec. Ch. 394. 2 Salk 508. 2 Atk. 300. 491. 2 P. Wms. 555. 1 Veſ. 519.

[g] Prec. Ch. 236. 2 Vern. 478. 2 Atk. 300. 3 Atk. 96. 1 Bro. Ch. Rep. 129. 1 Bro. Ch. Rep. 295. 2 Fonbl. 331. not. (m.) 2 Veſ. 635. 1 P. Wms. 409. not. (1.)

[h] 1 P. Wms. 324. 409. not. (1.) 2 P. Wms. 614. 2 Fonbl. 332. not. (o.)

[i] 1 P. Wms. 299.

of the will in which the legacy is given, ſhall he be ſuppoſed to have had it in contemplation to ſatisfy a debt that was not then in exiſtence [k].

[k] 2 Fonbl. 331, 332. 2 Salk. 508. 1 P. Wms. 409. 2 P. Wms. 342. 3 P. Wms. 353.

But in all caſes the legacy ſhall be conſtrued as a ſatisfaction, in caſe there be a deficiency of aſſets.

SECT. VII.

Of the abatement of legacies—of the refunding of legacies—of the reſiduum.

IN caſe the eſtate be ſufficient to anſwer the debts and ſpecific legacies, but not the general legacies, they are ſubject to abatement, and that in equal proportions; but in ſuch caſe, nothing ſhall be abated from ſpecific legacies [a].

[a] 2 Fonbl. 374. 2 Bl. Com. 513. 1 P. Wms. 679.

Nor ſhall a ſum of money bequeathed by the teſtator in ſatisfaction, or recompence of an injury done by him, abate any more than a ſpecific legacy [b]. But a legacy, although deviſed to be paid in the firſt place, ſhall abate, if the fund be inſufficient for the legacies [c], unleſs, perhaps, it be a proviſion for a wife [d]. So a deviſe of a perſonal annuity is not, as we have ſeen [e], a ſpecific legacy, but a legacy of quantity, and liable to abate accordingly [f].

[b] 2 Fonbl. 377.

[c] 2 Fonbl. 378. 1 Vern. 31.

[d] 2 Vef. 417.

[e] Vid. ſupr. 237.

[f] 3 Atk. 693. 2 Vef. 417. Sed vid. 1 Vef. 133.

If

If A. deviſe ſpecific and pecuniary legacies, and direct by the will that ſuch pecuniary legacies ſhall come out of all his perſonal eſtate, if there be no other perſonal eſtate than the ſpecific legacies, they muſt be intended to be ſubject to thoſe which are pecuniary, otherwiſe the bequeſt to the pecuniary legatees would be altogether nugatory [g]. So a legacy in favour of a charity, although preferred by the civil law, ſhall by our law abate equally with other general legacies [h].

[g] Prec. Ch. 393. 2 Fonbl. 377, 378.

[h] 1 P. Wms. 265 462. 675. 2 P. Wms. 25.

But in caſe of a deficiency of general aſſets, that is to ſay, of aſſets to pay debts, ſpecific legacies, although not liable to abate with the general legacies, muſt abate in proportion among themſelves [i].

[i] 2 Fonbl. 377. not. (q) 2 P. Wms. 382. 1 P. Wms. 403. 2 Vern. 111.

We have before ſeen [k], that a teſtator may carve ſpecific legacies out of a ſpecific chattel; now, in ſuch caſe, if the chattel ſo parcelled out prove deficient, ſuch ſpecific legacies muſt abate proportionally among themſelves [l].

[k] Vid. ſupr. 236.

[l] 2 Veſ. 563.

Such is the advantage to which a ſpecific legatee is entitled, that he ſhall not contribute with the other legatees in caſe of a deficiency. But on the other hand he is ſubject to a riſque; as for example, if ſuch ſpecific legacy be a leaſe, and there be an eviction, or, if goods, they be miſlaid, or burnt, or, if a debt, it be loſt by the inſolvency of the debtor; in all theſe inſtances ſuch ſpecific legatees ſhall receive no contribution [m].

[m] 1 P. Wms. 540.

On

On the same principle, legatees in certain circumstances are bound to refund their legacies, or a rateable part of them, as in all cases of a deficiency of assets for the payment of debts [n]. If the fund be merely insufficient to pay the legacies, and the executor pay one of the legatees, a distinction is to be remarked between cases, where such payment was voluntary, and where it was compulsory; and also between cases in which the assets were originally deficient, and where they became so by his subsequent misapplication of them. If the executor paid the legacy voluntarily, the law presumes, that he has sufficient to pay all the legacies, and the other legatees can resort only against him. The legatee, who has been paid, is subject to no claim on the part of the other legatees [o]; provided, according to some authorities [p], the executor be solvent; but if the executor prove insolvent, so that there are no other means of redress, the court will entertain a bill, to compel such legatee to refund.

[n] 2 Bl. Com. 513. 1 Vern. 94. 2 Ventr. 360.

[o] 2 Vef. 194. 2 Vern. 295.

[p] 2 Vef. 194.

In case the assets appear to have been originally deficient, if the executor, either voluntarily or by compulsion, pay one of the legatees, the rest shall make him refund in proportion. And, even if such legatee obtain a decree for his legacy, and be paid, the other legatees may oblige him to refund in the same manner. But if the executor had at first enough to pay all the legacies, and, by his subsequent wasting of the assets, they become deficient, in that case such legatee shall not be compelled to refund,

refund, but ſhall retain the benefit of his legal diligence in preference to the other legatees, who neglected to inſtitute their ſuit in time; by which they might have ſecured to themſelves the ſame advantage [q].

[q] 1 P. Wms. 495. not. (1.) 2 P. Wms. 446.

Nor is a legatee bound to refund at the ſuit of the executor, unleſs the payment by him were compulſory [r], or unleſs the deficiency were created by debts, which did not appear till after the payment of the legacy [s]: in either of which caſes, the executor as well as a creditor, may compel the legatee to refund the legacy; for an executor who pays a debt out of his own purſe ſtands in the place of a creditor, and has the ſame equity as againſt ſuch legatee [t].

[r] 2 Vern. 205.

[s] 1 Ch. Ca. 136.

[t] 4 Bac. Abr. 428. Vin. Abr. tit. Deviſe, (Q. d.)

When the executor has paid all the debts, and all the legacies abovementioned, pecuniary, and ſpecific, he muſt in the laſt place pay over the ſurplus, or reſiduum to the reſiduary legatee [u]. And although the reſiduary legatee die before payment of the debts, and before the amount of the ſurplus is aſcertained, yet it ſhall devolve on his repreſentative [w].

[u] 2 Bl Com. 514. 4 Bac. Abr. 428.

[w] Carth. 52.

If A. bequeath all the ſurplus of his perſonal eſtate, after payment of the debts, and legacies, to J. S. and ſeveral creditors, although barred by the ſtatute of limitations, commence actions againſt the executor, on his refuſal to plead the ſtatute, equity

equity will not in favour of such residuary legatee compel him to plead it [x].

[x] 4 Bac. Abr. 429. 1 Eq. Ca. Abr. 305. 11 Vin. Abr. 269. Prec. Chan. 100.

SECT. VIII.

Of an executor's being legatee: and herein of his assent to his own legacy.

IN case of a legacy bequeathed to the executor, if he take possession of it generally, he shall hold it as executor, which is his first, and general authority [a].

[a] 3 Bac. Abr. 84. 10 Co. 47. Plowd. 520. 543. 10 Co. 47. b. Dyer 277. b. Stra. 70.

The union of the two characters, of executor and legatee, in one and the same person, makes no difference [b]. His assent is as necessary to a legacy's vesting in him in the capacity of legatee, as to a legacy's vesting in any other person, and that on the same principle. Till he has examined the state of the assets, he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy, or whether it must not of necessity be applied in satisfaction of debts [c].

[b] Off. Ex. 224.

[c] Off. Ex. 27, 28.

His assent to his own legacy may, as well as his assent to that of another legatee, be either express, or implied. He may not only in positive terms announce his election to take it as a bequest, but such election may also be implied from his language

guage, or his conduct [d]. As if he say, that he will have it according to the will, that amounts to an assent to have it as legatee [e]. So, if a term be devised to A. the executor for life, and afterwards to B., if he say that B. will have it after him, that implies an election to take it as legatee [f]. So, if, by deed reciting, that he has a term for years by devise, he grants it over [g]; or, if he take the profits of it to his own use [h], or, if he repair the tenements devised at his own expence [i]; all these acts indicate an assent to the bequest: In like manner, if he perform a condition or trust annexed to the devise; as, if a lessee for years devise his term to his executor, on condition that he shall pay ten pounds to J. S., which he pays accordingly; this payment amounts to an election on his part to take the lease as a legacy, and it is in law an execution of the legacy for ever; for he who performs the charge of a thing claims the benefit which is annexed to it [k]. So, if a lease be devised to an executor during the minority of the testator's son, in order that the executor may educate him out of the profits, if he educate him accordingly, this constitutes an assent to take the lease by way of legacy, and not as executor [l], or, if he exclude a co-executor from a joint occupancy of the term with him [m], that is also an agreement to the legacy. An assent to take part as a residuary legatee, is an assent also to take the whole residue in the same character [n].

[d] Com. Dig. Admon. C. 6, 7. 1 Lev. 25.
[e] 1 Lev. 25.
[f] 1 Lev. 25.
[g] 1 Roll. Abr. 920.
[h] 1 Roll. Abr. 619.
[i] Semb. 1 Leon. 216.
[k] Plowd. 544.
[l] Plowd. 539.
[m] Dyer, 277. b.
[n] 2 Roll. Rep. 158.

But,

But, till the executor has made his election, either expreſs or implied, he ſhall take the legacy as executor, though all the debts have been paid independently of ſuch bequeſt [o].

[o] Com. Dig. Admon. C. 5. 1 Leon. 216.

Nor is the entry of an executor whether before or after probate on the term deviſed to him, an election to take it as legatee [p]. Nor, if he merely ſay, that the teſtator left all to him [q], will ſo ambiguous an expreſſion have that effect. Yet, if an executor, being alſo deviſee of a term, grant a leaſe of it by the name of executor, that amounts to a claim in ſuch capacity [r].

[p] Com. Dig. Admon. C. 7. Off. Ex. 226.

[q] 1 Roll. Abr. 620.

[r] 1 Leon. 216.

If a legacy be left to A. as executor, whether expreſsly for his care and trouble or not, he muſt either act, or diſtinctly ſhew his intention to act, before he ſhall become entitled to it [s].

[s] 3 Bro. Ch. Rep. 95. 3 Veſ. jun. 148. 4 Veſ. jun. 212.

The rules above ſtated in reſpect to the abatement and refunding of legacies in the caſe of legatees in general, apply equally to the caſe where the ſame perſon is both executor and legatee [t], and although the bequeſt were merely as a recompence for his executing the truſt [u].

[t] Plowd. 545. in not.

[u] 4 Bac. Abr. 427. 2 Vern. 434.

T SECT.

SECT. IX.

Of the teſtator's appointing his debtor executor—When the debt ſhall be regarded as a ſpecific bequeſt to him—When not.

IF a creditor appoint the debtor his executor, ſuch appointment ſhall operate as a releaſe, and extinguiſhment of the debt, on the principle, that from that act of the teſtator it may be reaſonably inferred that ſuch was his meaning. The debt, under theſe circumſtances, is conſidered in the nature of a ſpecific bequeſt or legacy to the debtor, for the purpoſe of diſcharging the debt [a]. Thus, if the obligor of a bond make the obligee executor, this amounts to a releaſe of the debt [b]. If ſeveral obligors be bound jointly, and ſeverally, and the obligee conſtitute one of them his executor, it is an extinguiſhment of the debt, and the executor is incapable of ſuing the other obligors [c]. The debt is alſo releaſed, where only one of ſeveral executors is indebted to the teſtator [d]; and after the death of ſuch executor, the ſurviving executors cannot ſue his repreſentative for the debt [e]. Nor is the caſe varied by the executor's dying without having proved the will, or having adminiſtered [f], or even by his refuſal to act with his co-executors [g], unleſs he formally renounced the office in the ſpiritual court: ſuch a renunciation, indeed, ſhall prevent the releaſe of his debt; for he could no more be compelled to accept a releaſe, than a deed of grant [h].

[a] 3 Bac. Abr. 11. 2 Bl. Com. 511, 512. Off. Ex. 31. Salk. 299. Plowd. 186. Com Dig. Admon. B. 5. Roll. Abr. 920, 921. 5 Co. 30. Hargr. Co. Litt. 264 b. not. 1.

[b] 8 Co. 136.

[c] Off. Ex. 31. 11 Vin. Abr. 398.

[d] Off. Ex. 31.

[e] Off. Ex. 32. Plowd. 264. Leon. 320.

[f] Salk. 300. Plowd. 184. Off. Ex. 31.

[g] Salk. 308.

[h] Salk. 307.

In

In all these cases the remedy is destroyed by the act of the party, and, therefore, is for ever gone [i]; but the effect is different where it is suspended merely by the act of law [k], and where, consequently, there is no room to infer any intention on the part of the deceased to release the debt; as, if administration of the effects of a creditor be committed to the debtor, this is only a temporary privation of the remedy by the legal operation of the grant [l]. Thus, if the obligor of a bond administer to the obligee, and die, a creditor of the obligee, having obtained administration *de bonis non*, may maintain an action for such debt against the executor of the obligor [m]. So, if the executrix of an obligee marry the obligor, such marriage is no release of the debt, for the testator has done no act expressive of an intention to discharge it, and the husband may pay it to the wife in the character of executrix. If he do not, the remedy is suspended merely by the legal effect of the coverture, and on her death, the administrator *de bonis non* of the testator will be equally entitled to that debt, as to any others outstanding [n].

[i] Cro. Car. 373. Salk. 302. 1 Ventr. 303.

[k] Salk. 303.

[l] Off. Ex. 32. 8 Co. 136.

[m] Sid. 79.

[n] Leon. 320. Moore 236. Salk. 306.

Nor will the law suffer such an intention of the testator to be carried into effect, where he has not left a fund sufficient for the payment of his own debts, and, in that case, the debt of his executor shall be assets. It were highly unreasonable that the claims of creditors should be defeated by a release, which was absolutely voluntary [o]. Such discharge, however, shall in general be preferred to legacies.

[o] Salk. 302, 306. Off. Ex. 31. 2 Bl. Com. 511. Plowd. 136.

For, as I have already obſerved, the debt is conſidered in the light of a ſpecific bequeſt to the debtor, and, therefore, though like all other legacies, it ſhall not be paid or retained till the debts are ſatisfied, yet the executor has a right to it excluſive of the other legatees [p].

[p] 2 Bl. Com. 512. Hargr. Co. Litt. 264. b. not. 1.

Nor ſhall ſuch debt be releaſed even as againſt legatees, if the preſumption ariſing from the appointment of a debtor to the executorſhip, be contradicted by the expreſs terms of the will; or by ſtrong inference from its contents. As where a teſtator leaves a legacy, and directs it to be paid out of a debt due to him from the executor; ſuch debt ſhall be aſſets to pay not merely that ſpecific legacy, but all other legacies [q]. In like manner, if he leave the executor a legacy, it is held to be a ſufficient indication, that he did not mean to releaſe the debt. And, in ſuch caſe, the executor ſhall be truſtee to the amount of the debt for the reſiduary legatee, or next of kin [r]. So, where a teſtator bequeathed large legacies, and alſo the reſidue of his eſtate to his executors, one of whom was indebted to him by bond in three thouſand pounds, it was decreed that this debt ſhould be added to the ſurplus, and that both executors were equally entitled to it [s]. It ſeems, alſo, that the naming of a debtor executor, *durante minoritate*, is no diſcharge of the debt; ſince he is only executor in truſt for the infant, till he comes of age [t].

[q] 3 Bac. Abr. 11. Yelv. 160.

[r] Carey v. Goodinge, 3 Bro. Ch. Rep. 110.

[s] Ca. Temp. Talbot, 240. 3 Bac. Abr. 12.

[t] 11 Vin. Abr. 400. Lord Raym. 605.

SECT.

SECT. X.

Of the reſidue undiſpoſed of by the will, when it ſhall go to the executor—When not.

IF the teſtator make no diſpoſition of the reſidue, a queſtion ariſes, to whom it ſhall belong, and this is a ſubject which involves in it a great variety of diſtinctions [a].

[a] 1 P. Wms. 550. note (1.) 2 Fonbl. 131. not.(k.) 3 Bac. Abr. 67. 12 Vin. Abr. 407.

The reſult of the numerous caſes on this ſubject appears to be this:

The whole perſonal eſtate of the teſtator is, in point of law, devolved on the executor; and if, after payment of the funeral expences, teſtamentary charges, debts, and legacies, there ſhall be any ſurplus, it ſhall veſt in him beneficially.

If it ſhall appear on the face of the will, either expreſsly, or by ſufficient implication, that the teſtator meant to confer upon him merely the office, and not the beneficial intereſt, equity will convert the executor into a truſtee for thoſe on whom the law would have caſt the reſidue in caſe of a complete inteſtacy; that is to ſay, the next of kin. As, where the teſtator has ſtyled him in his will an executor in truſt, or has uſed other expreſſions of the ſame import [t]. So, where the teſtator has begun to make a diſpoſition of the ſurplus, but

[t] 1 P. Wms. 550. not. 1. 2 Vern. 99. 2 P. Wms. 158. 2 Atk. 18. 2 Bro. Ch. Rep. 634. 3 Bro. Ch. Rep. 28. Moſely 288. 301. 1 Veſ. jun 63.

has not proceeded to complete it, there, alſo, the executor ſhall be excluded. As where a reſiduary clauſe is inſerted in the will, and the teſtator has omitted to name the reſiduary legatee [u]. Nor, where the teſtator has regularly bequeathed the ſurplus, although the reſiduary legatee firſt die, and conſequently it be undiſpoſed of at the time of the teſtator's death, ſhall it belong to the executor [w]. Nor ſhall the executor be entitled to it where the teſtator has given him a legacy expreſsly for his care and trouble, for that is a ſtrong caſe on which to raiſe a reſulting truſt, not merely on the abſurdity of ſuppoſing a teſtator to give a part of the fund to that perſon, for whom he intended the whole; but, as it is evidence, that he conſidered him as a truſtee for ſome other, who ſhould be the object of the care and trouble, for which the bequeſt was meant as a compenſation [x]. Still, however, the principle, that it ſhall not be preſumed to have been the teſtator's meaning thus to give part and all to the executor, has been allowed, alone and unaided, to operate as an excluſion. Hence it is a ſettled rule in equity, that a pecuniary legacy bequeathed to an executor, affords a ſufficient argument to debar him of the reſidue [y].

[u] 1 P. Wms. 550. not. 1. Moſely 288. 2 Veſ. 91. 495. 2 Veſ. jun. 78.

[w] 1 P. Wms. 550. not. 1. Ambl. 769. 3 Bro. Ch. Rep. 28.

[x] 2 Fonbl 131. not. k. 2 Veſ. 97, 1 Vern. 473. 2 P. Wms. 357. 2 Vern. 148. 2 Atk 46.

[y] 1 P. Wms. 550. not. 1. 2 Fonbl. 131. not. k. 2 Vern. 676. Bunb. 112. 1 P. Wms. 544. 3 P. Wms. 40. Prec. Chan. 107.

If the legacy to the executor be ſpecific, it ſhall equally exclude him [z]. Nor will the rule be varied by the teſtator's having bequeathed legacies to the next of kin [a]. For it is founded rather on an implied intent to bar the executor, than to create a truſt for the next of kin; and, therefore, if

[z] 2 Vern. 425. 3 Atk. 226. 1 Bro. Ch. Rep. 154.

[a] 2 Fonbl. 131. not. k. 2 Vern. 361. Moſely 288. 2 Veſ. 162. 1 Veſ. jun. 66. in not.

if the executor have a legacy, and there be no next of kin, a truſt ſhall reſult for the crown [b]. It is alſo ſettled, that in caſe the widow of the teſtator be executrix, ſhe is, in reſpect to the reſidue, preciſely in the ſame ſituation as any other perſon appointed to the office [c]; unleſs the bequeſt to her of a ſpecific legacy conſiſting of property which was her's before marriage, may vary the rule [d].

[b] 1 Bro. Ch. Rep. 201.

[c] 1 P. Wms. 115. 550. not. 1. 2 Fonbl. 130. not. i. Ambl. 126. 2 Eq. Ca. Abr. 444. 1 Bro. Ch. Rep. 154.

[d] 2 Fonbl. 130. not. i. 7 Bro. P. C. 511.

In reſpect to that claſs of caſes, in which the executor ſhall be entitled to the reſidue, although he be a legatee, it may be ſtated as an univerſal rule, that wherever the legacy is conſiſtent with the intent, that the executor ſhould take the whole, a court of equity will not diſturb his legal right. And, therefore, where a gift to an executor is only an exception out of another legacy; as if a library be bequeathed to A., out of which the executor is to ſelect ten books for himſelf; it ſhall not exclude him from the reſidue, inaſmuch as it was neceſſary to make an expreſs exception [e]. Nor where the executorſhip is limited to a particular period, or determinable on a contingency, and the legacy to the executor, at the end of ſuch period, or on ſuch contingency's taking place, is bequeathed over, ſhall it defeat his claim to the ſurplus [f]. Nor ſhall a gift of only a limited intereſt for the life of the executor have that effect [g]. For in theſe caſes the legacy is conſidered as an exception out of the general gift to the deviſee over, and therefore not ſuch a legacy as ſhall exclude

[e] 1 P. Wms. 550. not. 1. 1 Prec. Chan. 231. 2 Eq. Ca. Abr. 444. pl. 58. 2 Atk. 45. 3 Atk. 229. Vid. alſo 7 Bro. P. C. 511.

[f] 2 Fonbl. 131. not. k. Prec. Chan. 263.

[g] 2 Fonbl. 131. not. k. 1 P. Wms. 114. Prec. Chan. 316. 1 Veſ. jun. 356.

clude the executor from the reſidue, ſince it does not involve the abſurdity of giving expreſsly a part where the whole was intended to be given [h]. But the limited executor has an intereſt in the reſidue only while his executorſhip continues, on the determination of which it devolves on the general executor [i].

That parol evidence may be received for the purpoſe of rebutting a reſulting truſt, is ſufficiently eſtabliſhed by a ſeries of caſes; but it is admitted with great caution [k], and reſtricted to what paſſed at the time of making the will [l].

[h] 1 P. Wms. 116. not. 1.

[i] Vid. Prec. in Chan. 264.

[k] 2 Fonbl. 135. not. l. 2 P. Wms. 158. 160. 210. 2 Veſ. 28. 1 Veſ. jun 358.

[l] 2 P. Wms. 209. 1 Veſ jun. 359.

CHAP.

CHAP. VI.

OF THE INCOMPETENCY OF AN INFANT EXECUTOR—OF THE ACTS OF AN EXECUTOR DURANTE MINORITATE—*OF A MARRIED WOMAN EXECUTRIX—OF CO-EXECUTORS—OF EXECUIOR OF EXECUTOR—OF EXECUIOR* DE SON TORT.

AN infant, as it has been already ſtated [a], is now, by the ſtat. 38 *Geo.* 3. *c.* 87. incapable of the functions of an executor, till he ſhall have attained his full age of twenty-one years. Nor before the paſſing of this ſtatute was an infant competent to act, till he had arrived at the age of ſeventeen [b]; but at that age he had a right to aſſume the executorſhip. He had authority to ſell the teſtator's effects, to pay and receive debts, to aſſent to, and pay legacies, and, generally, to diſcharge the duties which belong to the repreſentative of the deceaſed [c]. Yet if an infant executor, after the age of ſeventeen, and before the age of twenty-one, years, releaſed a debt due to the teſtator without actually receiving it, ſuch a releaſe was held to be void: or, if he received only a part of it, it was void for the remainder; for otherwiſe he would have been diveſted of that privilege, which the law allows to all infants, of reſcinding their acts when they are manifeſtly to their diſadvantage. Nor could

[a] Supr. 12. 73.

[b] Off. Ex. 214. 1 Roll. Abr. 730. Sed vid. Cro. Eliz. 254. 3 Leon. 143. Keilw. 51. 2 Saund. 212. 1 Bl. Com. 463.

[c] 3 Bac. Abr. 8. Off. Ex. 215. 217, 218. Com. Dig. Admon. E.

could a proceeding prejudicial both to the infant, and to the eſtate, be regarded as purſuant to his office [d]. On the ſame principle the aſſent of ſuch infant executor to a legacy did not bind him, unleſs he had aſſets for the payment of debts [e]. Nor had he a power of committing any other act which might involve him in the conſequences of a devaſtavit [f]. Nor, in a late caſe, would the court of chancery direct money to be paid to an infant executor, although he had attained the age of ſeventeen; but referred it to a maſter to inquire, whether there were any debts or legacies, and to conſider of a maintenance [g].

[d] 3 Bac. Abr. 8. 5 Co. 27. Off. Ex. 217, 218. Com. Dig. Admon. E. Moore 146. Cro. Eliz. 671. Cro. Car. 490.

[e] Off. Ex. 217. 225.

[f] 1 Vern. 328.

[g] 3 Bro. Ch. Rep. 195.

But theſe diſtinctions it is now needleſs to diſcuſs, the ſtatute having altogether diſqualified an infant executor from exerciſing the office during his minority, and having directed adminiſtration with the will annexed, to be granted to ſome other perſon in the interim [h].

[h] Vid. ſupr. 12. 73.

If A. appoint B., an infant, his executor, and C. executor during the minority of B. C. though only a temporary executor, ſeems, during the continuance of his office, to be inveſted with the ſame powers as belong to an abſolute executor; and although he be named in the will adminiſtrator only for the benefit of the infant [i].

[i] Off. Ex. 215, 216. Com. Dig. Admon. F.

In caſe a married woman be executrix, the huſband, as we have before ſeen [k], has a right to act in the adminiſtration with, or without her conſent.

[k] Supr. 187.

He is empowered to reduce into poſſeſſion, or to diſpoſe of the property by way of gift, ſale, ſurrender, or releaſe, to receive, and pay debts, to aſſent to, and pay legacies, and to elect for his wife to take as legatee [m]. On the contrary, ſuch acts, if performed by her without his permiſſion, are of no validity [n]. If the huſband be abroad, the court of chancery will reſtrain the executrix from getting in the aſſets of the teſtator, and appoint a receiver for that purpoſe, with power to commence ſuits for the recovery of debts due to the eſtate [o].

[m] Com. Dig. Admon. D. Off. Ex. 207, 208. 1 Salk. 306.

[n] 3 Bac. Abr. 9. Keilw. 122. Off. Ex. 207, 208. Vid. Anderſ. 117. 1 Roll. Abr. 924.

[o] 2 Atk. 213.

And this doctrine is founded on the principle, that as he is perſonally reſponſible for ſuch acts, the law makes it eſſential to their validity, that they ſhould be performed by him, or at leaſt with his concurrence: otherwiſe the miſconduct of the wife in the executorſhip might be extremely prejudicial to the huſband [p].

[p] Off. Ex. 207, 208. 225. 1 Fonbl. 84. 86. 5 Co. 27.

Yet, if an executrix marry, and the huſband eſloine the goods, or is guilty of any other ſpecies of *devaſtavit*, it will be a *devaſtavit* alſo by the wife, and they will be both anſwerable accordingly [q]. On the other hand, if an executrix commit a *devaſtavit*, and then marry, the huſband, as well as the wife, is chargeable for it during the coverture [r].

[q] Com. Dig. Admon. D. Cro. Car. 510. Dyer 210. in marg. 2 Bro. Ch. Rep. 323.

[r] Com. Dig. Baron & Feme, N. Cro. Car. 603. Moore 761.

If the teſtator were indebted to the huſband, or, which is the ſame thing, to the wife, before marriage, the huſband may retain.

If

If the husband were indebted to the testator, the making of the wife executrix is equally a release of the debt, as if she had been the debtor; although if an executrix after the death of the testator marry such debtor, it will be a *devastavit* [r].

[r] Off. Ex. 207.

If specific legacies are left to a husband and wife jointly, and they are named executors, such legacies shall exclude them from the residue, for they are analogous to a specific legacy to a sole executor [s].

[s] 1 P. Wms. 550. not. 1. ad fin. Barnard. 64.

Co-executors, we may remember, are regarded in law as an individual person [t]; and by consequence, the acts of any one of them in respect to the administration of the effects, are deemed to be the acts of all: for they have a joint and entire authority over the whole property [u]. Hence a release of a debt by one of several executors is valid, and shall bind the rest [w]. So a grant, or a surrender, of a term, by one executor, shall be equally available [x]. It has been likewise held, that if one confess a judgment, the judgment shall be against all [y]. But on the contrary, where there were three executors, one of whom gave a warrant of attorney to confess judgment against himself and his co-executors, pursuant to which a judgment was entered against all the executors *de bonis testatoris*, for the debt, and against the executor who gave the warrant, *de bonis propriis*, for the costs; it was set aside, on the ground that executors may plead different pleas, and that which is most for the testator's advantage, shall

[t] Vid. supr. 16. 188.

[u] 3 Bac. Abr. 30. Off. Ex. 95. 1 Roll. Abr. 924. Com. Dig. Admon. B. 12.

[w] Dyer 23. b.

[x] Dyer 23. b..

[y] Dyer 23. b. in not.

ſhall be received [z]. If one executor grant or releaſe his intereſt in the teſtator's eſtate to the other, nothing ſhall paſs, becauſe each was poſſeſſed of the whole before [a]. It has been adjudged alſo, that if one of two executors appointed by the obligee deliver the bond to a ſtranger in ſatisfaction of a debt due from himſelf and die; although the debt as a choſe in action could not paſs by the aſſignment, yet by this delivery the party had ſuch an intereſt in the inſtrument, that he might juſtify the detention of it as agāinſt the ſurviving executor [b]; but the law of this caſe ſeems very dubious, inaſmuch as the debt not being aſſignable, could not paſs by the delivery of the obligation [c].

[z] Stra. 20. Vid. 10 Mod. 323. 1 Atk. 46c.

[a] Godolph. 134. 3 Bac. Abr. 31.

[b] 2 Roll. Abr. 46. Dyer 23. b. Cro. Eliz. 478. 496.

[c] 3 Bac. Abr. 31. in not.

One executor ſhall not be allowed to retain his own debt in prejudice to that of his co-executor in equal degree, but both ſhall be diſcharged in proportion [d].

[d] 2 Fonbl. 46. not. (l). 11 Vin. Abr. [illegible].

An aſſent to a legacy by one of ſeveral executors is ſufficient [e]. And if there be a deviſe to all the executors generally, one of them may aſſent for his part [f].

[e] Com. Dig. Admon. C. 8. Off. Ex. 225.

[f] 1 Roll. Abr. 618.

Co-executors, as well as a ſole executor, ſhall be excluded from the reſidue, either in caſe the teſtator ſhall have expreſsly deſcribed them as mere truſtees, or, according to the fair conſtruction of the will, appears to have ſo conſidered them, or, in caſe he has made an imperfect diſpoſition of the reſidue, as where he has inſerted a reſiduary clauſe without

without proceeding to ſpecify the reſiduary legatee; or where he has bequeathed the ſurplus to a party, who died before him [g].

[g] 1 P. Wms. 7. & 550. not. 1. 2 Fonbl. 133. in not.

But if a legacy be given to one executor expreſsly for his care and trouble, and no legacy given to his co-executor, it is a point unſettled, whether in ſuch caſe they ſhall be barred of the reſidue [h]. This, however, is clear, that if there be two or more executors, a ſimple legacy to one ſhall not exclude them, for the teſtator may have intended a preference to him to that extent [i]. So, where ſeveral executors have unequal legacies, whether pecuniary or ſpecific, they ſhall nevertheleſs be entitled to the ſurplus [k]. But where equal pecuniary legacies are given to co-executors, a truſt ſhall reſult for the next of kin [l]. The arguments which have been urged in oppoſition to this rule, and to ſhew that the giving of equal pecuniary legacies to ſeveral executors, is not abſolutely inconſiſtent with an intention that they ſhould take the ſurplus, are, that ſuch gift would ſecure to them a proportion of their legacies in the event of a deficiency of aſſets, which applies equally to the caſe of a *ſole* executor; and, that they would take the legacies ſeverally, whereas the reſidue would belong to them jointly. Yet the rule has long prevailed, as above ſtated [m]. No caſe, however, occurs in the books, in which diſtinct ſpecific legacies of equal value to ſeveral executors have excluded them from the reſidue. And the argument, which ſupports the rule as to pecuniary, by no means applies with equal

[h] 2 Fonbl. 133. in not.

[i] 1 P. Wms. 550. not. 1. Prec. Chan. 323. 4 Bro. P. C. 1. 2 Veſ. 91. 166, 167. 2 Fonbl. 133. in not. 2 Atk. 220.

[k] 1 P. Wms. 550. not. 1. 2 Atk. 69. 1 Bro Ch. Rep. 328. 2 Fonbl. 134. in not. 2 Veſ. 27.

[l] 1 P. Wms. 7. 3 Bro. Ch. Rep. 110.

[m] 1 P. Wms. 550. not. 1.

equal force to ſpecific legacies, ſince it is very probable, that a teſtator may wiſh to diſtribute ſpecific quantities of ſtock, or particular debts among his executors in ſome particular manner, although equally in point of value, and conſiſtently with an intention, that they ſhould take the ſurplus [l].

[l] 1 P. Wms. 550. not. 1. 2 Fonbl. 134. in not.

Nor does the caſe juſt mentioned [m], of ſpecific legacies bequeathed jointly to a huſband and wife who are named executors, bear upon the point; for, as it was before obſerved, it is ſimilar to that of a ſpecific legacy to a ſole exeeutor [n].

[m] Supr 282.

[n] 1 P. Wms. 550. not. 1. ad fin. Barnard. 64.

The power of an executor is not determined by the death of his co-executor, but ſurvives to him; and therefore, it is held he may aſſent to a legacy [o].

[o] Com. Dig. Admon. B. 12. 3 Atk. 509. 1 Veſ. 9.

As a mediate or remote executor has the ſame intereſt in the effects of the original teſtator, as the immediate executor, he is inveſted with the ſame authority, and privileges, and is bound to adminiſter ſuch effects in the ſame manner [p]. But in caſes of ſpecial truſt confided to the executor without the ordinary limits of his duty, as to ſell land, and the like, if it be not performed by the original executor, no ſucceſſive executor as ſuch, ſhall have authority for that purpoſe [q].

[p] Com. Dig. Admon. G. Off. Ex. 257, 258.

[q] Off. Ex. 258, 259.

In reſpect to an executor *de ſon tort*, he may perform a variety of acts, which ſhall be as binding as thoſe of a rightful exeeutor [r]. As againſt creditors,

[r] 5 Bac. Abr. 25. Off. Ex. 189.

tors, he is juſtified in paying the debts of the deceaſed [s], and indeed may be compelled to pay them, ſo far as aſſets come to his hands [t]; and to an action brought againſt him by a creditor, he may plead *plene adminiſtravit* [u].

[s] Off. Ex. 181, 182.

[t] 2 Bl. Com. 507. Dyer 166. b.

[u] 3 Bac. Abr. 25. 5 Co. 30. Off. Ex. 181. Carth. 104. Sid. 76.

In caſe the rightful repreſentative ſhall think fit to purſue his legal remedy againſt ſuch an intruder, he has no defence; as, if it be by action of trover for the goods of the teſtator, the executor *de ſon tort* cannot plead payment of debts to the value, or that he hath given the goods in ſatisfaction of the debts; for he had no right to interfere.

Yet on the general iſſue pleaded, he may give in evidence ſuch payments, and they ſhall be deducted from the damages [w], or, if they amount to the full value, the plaintiff ſhall be nonſuited [x]. But it may be doubted, whether in ſuch action the defendant can give in evidence payment of debts to the value of ſuch goods as are ſtill in his cuſtody, or only of thoſe which he has ſold [y]. If the action be treſpaſs inſtead of trover, payment of debts to the value will go only in mitigation of damages [z], and the plaintiff will be entitled to a verdict.

[w] Com. Dig. Admor. C. 3. 3 Bac. Abr. 25. Carth. 104. Skin. 274. pl. 2. Off. Ex. 182. 1 Ventr. 349, 350. 2 Bl. Com. 508.

[x] L. of Ni. Pr. 48.

[y] L. of Ni. Pr. 48. 12 Mod. 471.

[z] L. of Ni. Pr. 48. 91. Ca. B. R. 441.

The ground of the diſtinction ſeems to be this: in trover, his poſſeſſion is admitted to have been lawful, and the ſubſequent diſtribution negatives the converſion; but in treſpaſs, the unlawful taking is the ſubject matter of complaint, to which the diſtribution is not an anſwer.

Nor,

Nor, in any case shall such payments be allowed to nonsuit the plaintiff, or to lessen the damages, if there be a failure of assets, and the lawful executor would by these means be divested of his right of preferring one creditor to another of equal rank, or giving himself the same preference [a].

[a] 2 Bl. Com. 508. Off. Ex. 182.

Nor shall an executor *de son tort*, derive any advantage from the wrongful character which he has assumed. He is not entitled to bring an action in right of the deceased [b], nor is he empowered to retain in satisfaction of his own debt: for such a privilege would enable him to profit by his own tortious acts, and would tend to encourage a competition of creditors, who should first take possession of the testator's effects, without any legal authority [c].

[b] 2 Bl. Com. 507. Bro. Abr. tit. Admor. 8. 11 Vin. Abr. 222. 2 Anders. 39. pl. 25.

[c] 2 Bl. Com. 511. 5 Co. 30. Moore 527.

There is, indeed, one exception to this rule; a party who, by stat. 43 *Eliz. c.* 8 [d]. becomes an executor *de son tort*, in consequence of a gift to him of the intestate's effects by an administrator who has obtained the grant fraudulently, is by the express provision of that act allowed to retain. But in all other instances, an executor *de son tort* is excluded from this advantage. Nor shall he retain for his own debt, even against a creditor of inferior degree [e]. Nor, after an action brought against him by a creditor, can he avail himself of a delivery over of the effects to the rightful administrator, though before the filing of the plea, nor of the assent of the administrator to his retainer of his debt.

[d] See Com. Dig. Admor. C. 3. Off. Ex. 182, 183. 2 H. Bl. 26. in not. & Vid. supr. 19.

[e] 3 Bac. Abr. 25. 5 Co. 30. Cro. Eliz. 630. 1 Roll. Abr. 922.

Nor is the case varied, although in point of fact no administration were granted at the time of the commencement of such suit, and the defendant without delay relinquished the property to the grantee [f].

[f] Curtis v. Vernon, 3 Term Rep. 587. affirmed in Exch. Chamb. 2 H. Bl. 26.

If the executor *de son tort* deliver the effects to the administrator before such action brought, that is a sufficient defence, and he may give it in evidence on the plea of *plenè administravit* [g].

[g] 1 Salk. 313.

The grant of administration to such executor shall legalise his previous acts [h]. Thus, where he takes possession of the testator's goods, and sells them, and afterwards is appointed administrator, such subsequent grant shall make the sale effectual [i]. So, if A. be ordered by B. to sell the effects of the intestate, and B. afterwards take out administration; A. to an action brought against him by a creditor may plead *plenè administravit*, and shall be discharged on this evidence [k]. An administration, also, committed to an executor *de son tort*, and although committed to him *pendente lite*, shall warrant his retainer of his own debt, on the same principle of necessity, on which such right of executors is in general founded, namely, to avoid the inconvenience and absurdity of a party's instituting a suit against himself [l]. So, where A., entitled to administration was opposed in the ecclesiastical court, and, *pendente lite*, being sued as executor in the court of king's bench, pleaded a retainer for a debt due to himself, to which the plaintiff replied, that the defendant was executor *de son tort*: the defendant

[h] Com. Dig. Admor. C. 3. Moore 126. 3 Term. Rep. 590. 2 H. Bl. 25.

[i] Moore 126.

[k] Cro. Car. 88.

[l] 2 H. Bl. 25. argdo. Com. Dig. Admor. C. 3. 2 Ventr. 180. Sty. 337.

fendant rejoined, that letters of adminiſtration had been granted to him *puis darrein continuance*; on demurrer, the plea was allowed, and judgment given for the defendant [m]. But if A. diſpoſe of an inteſtate's goods to B. for the payment of the funeral, and afterwards take adminiſtration, it has been held, he ſhall not have an action of trover againſt B. for the goods [n].

[m] 3 Bac. Abr. 26. in not. 2 Stra. 1106. Andr. 328. S.C. 3 Term Rep. 588. S C. cited L. of Ni. Pr. 143, 144.

[n] R. per two Juſt. Holt. C.J. contr. Salk. 295. Skin. 274. Vid. Carth. 104.

CHAP. VII.

OF DISTRIBUTION.

SECT. I.

Of diſtribution under the ſtatute—and herein of advancement.

I AM now to diſcuſs the power and duty of an adminiſtrator. His office, ſo far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the ſame as that of an executor. But as there is no will to direct the ſubſequent diſpoſition of the property, at this point they ſeparate, and muſt purſue different courſes.

After the ordinary was diveſted of the power of adminiſtering an inteſtate's effects, and compelled, in the manner abovementioned [a], to delegate ſuch authority to the relations of the deceaſed, the ſpiritual court attempted to enforce a diſtribution, and took bonds of the adminiſtrator for that purpoſe; but ſuch bonds were prohibited in the temporal courts, and declared to be void in point of law, on the ground, that, by the grant of adminiſtration, the eccleſiaſtical authority was executed, and ought to interpoſe no farther [b]. Thus the grantee was entitled

[a] Supr. 54. et ſeq.

[b] 2 Bl. Com. 515. 2 P. Wms. 445. 1 Lev. 233. Cart. 125.

titled not only to administer, but also exclusively to enjoy the residue of the intestate's effects [c]. For the purpose therefore of aiding the imperfect jurisdiction of the ordinary, and of preventing any single hand from sweeping away the whole surplus [d], the stat. 22 & 23 *Car.* 2. *c.* 10. commonly called the statute of distributions [e], was enacted. That statute after empowering the ordinary on the granting of administration, to take a bond of the administrator, with two or more sureties conditioned, as I have already stated, farther authorises him to proceed, and call such administrator to account touching the goods of the intestate; and, on hearing, and on due consideration thereof, to make equal, and just distribution of what remains clear after all debts, funeral, and just expences of every sort first allowed, and deducted, among the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the deceased, in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules, and limitation thereafter set down; and the same distributions to decree and settle, and to compel such administrator to observe and pay the same by the due course of the ecclesiastical laws. The statute then proceeds to prescribe the distribution of such surplusage in manner following; that is to say, one third part thereof to the wife of the intestate, and all the residue by equal portions among his children, and such persons as legally represent such children, in case any of them be then dead, other than such child or children not being heir at law, as shall

[c] 2 P. Wms. 448.

[d] 1 P. Wms. 594 Raym. 496. 4 Burn Eccl. L. 342, 343.

[e] Made perpetual by 1 Jac. 2. c. 17. s. 5. Vid. 1 Lord Raym. 574.

have any eſtate by the ſettlement of the inteſtate, or ſhall be advanced by him in his life-time by portion equal to the ſhare, which ſhall by ſuch diſtribution be allotted to the other children to whom ſuch diſtribution is to be made; and in caſe any child, other than the heir at law, who ſhall have any eſtate by ſettlement from the inteſtate, or ſhall be advanced by him in his life-time by portion, not equal to the ſhare which will be due to the other children by the diſtribution, then ſo much of the ſurpluſage ſhall be diſtributed to ſuch child as ſhall have any land by ſettlement from the inteſtate, or was advanced in the life-time of the inteſtate, as ſhall make the eſtate of all the children to be equal as near as can be eſtimated; but the heir at law, notwithſtanding any land that he ſhall have by deſcent or otherwiſe from the inteſtate, is to have an equal part in the diſtribution with the reſt of the children, without any conſideration of the value of ſuch land.

It then directs, that in caſe there be no children, nor any legal repreſentatives of them, one moiety of the eſtate ſhall be allotted to the wife of the inteſtate, and the reſidue of the ſame ſhall be diſtributed equally among every of his next of kindred who are in equal degree, and thoſe who legally repreſent them.

It alſo provides, that no repreſentations ſhall be admitted among collaterals after brothers', and ſiſters' children; And in caſe there be no wife, then that

that all the eſtate ſhall be diſtributed equally among the children; and, in caſe there be no child, then among the next of kindred to the inteſtate in equal degree, and their legal repreſentatives as aforeſaid, and in no other manner.

And it farther directs, for the benefit of creditors, that no ſuch diſtribution of the goods of an inteſtate ſhall be made, till after the expiration of one year from his death; and that every one to whom any diſtribution and ſhare ſhall be allotted, ſhall give bond with ſufficient ſureties, in the ſpiritual court, that if any debt truly owing by the inteſtate, ſhall be afterwards ſued for and recovered, or otherwiſe duly made to appear, that then, and in every ſuch caſe, he ſhall refund, and pay back to the adminiſtrator, his rateable part of that debt, and of the coſts of ſuit, and charges of the adminiſtrator by reaſon of ſuch debt, out of the part and ſhare ſo allotted to him, thereby to enable the adminiſtrator to pay and ſatisfy the debt ſo diſcovered after the diſtribution made.

The ſtatute alſo contains a proviſo, that in all caſes where the ordinary hath uſed heretofore to grant adminiſtration *cum teſtamento annexo*, he ſhall continue ſo to do; and the will of the deceaſed in ſuch teſtament expreſſed, ſhall be performed, and obſerved in ſuch manner as before the paſſing of the act.

It alſo expreſsly excepts, and reſerves the cuſtoms of the city of London, of the province of York, and of other places having peculiar cuſtoms of diſtributing an inteſtate's effects.

Doubts having ariſen, whether the huſband's right to adminiſtration to his wife was not ſuperſeded by force of this ſtatute, and whether he was not thereby bound to diſtribute her perſonal eſtate among her next of kin; by the ſtat. 29 *Car.* 2. *c.* 3. *ſ.* 25. it is provided, that the above act ſhall not extend to eſtates of feme coverts, who die inteſtate, but that the huſband may demand, and have adminiſtration of their rights, credits, and other perſonal eſtates, and recover and enjoy the ſame as before.

Vid. ſupr. 58.

On the conſtruction of the ſtatute of diſtributions, a variety of points have been reſolved.

After the allotment of one third to the widow, the ſtatute, as we have ſeen, directs a diſtribution of the reſidue by equal portions among the inteſtate's children, and ſuch perſons as legally repreſent ſuch children, in caſe any of them be dead, that is their lineal deſcendants to the remoteſt degree.

To attain a clearer apprehenſion of the ſubject, three ſorts of caſes may be ſuppoſed: Firſt, where none of the inteſtate's children are dead. Secondly, where the inteſtate's children are all dead, all of them having left children. Thirdly, where ſome of the inteſtate's children are living, and ſome dead,

dead, and such, as are dead, have each of them left children.

On the first hypothesis, that is to say, where none of the intestate's children are dead; it is sufficiently obvious, that after the wife has had her third allotted to her, the remaining two thirds shall, pursuant to the statute, be equally divided among all the children of the intestate, as in this case they all claim in their own right. A brother, or sister of the half blood, shall be equally entitled to a share with one of the whole blood, inasmuch as they are both equally near of kin to the intestate [f]. Nor shall their being posthumous in either case make any difference [g]. If the intestate leave only one child, such case is not to be considered as omitted by the statute; therefore, in case he also leave a wife, she shall have only a third part, and the other two thirds shall go to such child [h]. So, where there is only one to claim under the statute, and therefore, literally and strictly speaking, there can be no distribution, yet such individual shall be entitled to the property [i].

In regard to the second supposition, if A. have three children, B. C. and D., and they all die, B. leaving, for instance, two children, C. three, and D. four, and A. afterwards die intestate; in that case all his grand-children shall have an equal share: for as his children are all dead, their children shall take as next of kin. Such also would be the case with respect to the great-grandchildren of

[f] 3 Bac. Abr. 74. 1 Mod. 209. 2 Mod. 204. 2 Jones 93. 1 Ventr. 316. 2 Lev. 173. Show. Parl. Ca. 108. 1 Vern. 437. 2 Vern. 124. Carth. 51.

[g] Burnet v. Man, 1 Vef. 156. 4 Burn Eccl. L. 344. 2 Freem. 230. 2 P. Wms. 446.

[h] 3 Bac. Abr. 75. Carth. 52. Skin. 212. pl. 5. 219. pl. 3.

[i] 4 Burn Eccl. L. 343. 3 P. Wms. 49. note (D).

of the inteſtate, if both his children, and grand-children had all died before him [k].

[k] 3 Bac. Abr. 75. 1 Eq. Ca. Abr. 249. pl. 7. Prec. Chan. 54. 1 P. Wms. 595. 3 P. Wms. 50. 2 Veſ. 213. 1 Atk. 454. Bunb. 159. 2 Bl. Com. 517.

In all the above inſtances, the parties are ſaid to take *per capita*, or, in other words, equal ſhares in their own right [l].

[l] 2 Bl. Com. 218. 517.

Thirdly, in the event of ſome of the inteſtate's children being living, and ſome dead, and ſuch as are dead, having each left children; the grand-children take *per ſtirpes*, that is to ſay, not in their own right, but by repreſentation [m]. Thus, for example, if A. have three ſons, B. C. and D., and B. die, leaving four children, and C. die, leaving two: on A.'s dying inteſtate, one third ſhall be allotted to D., one third to B.'s four children, and the remaining third to C.'s two children; for theſe grand-children are entitled as repreſenting their reſpective parents [n].

[m] 2 Bl. Com. 217.

[n] 3 Bac. Abr. 75. 1 Eq. Ca. Abr. 249. Prec. Chan. 54. 2 Bl. Com. 517.

After directing the reſidue to be divided among the children, or their repreſentatives, as above ſtated, the ſtatute provides, that no child of the inteſtate, except his heir at law, on whom he ſettled in his life-time any eſtate in lands, or pecuniary portion equal to the diſtributive ſhares of the other children, ſhall participate with them of the ſurplus; but if the eſtate, ſo given him by way of advancement, be not equivalent to their ſhares, then that ſuch part of the ſurplus as will make it ſo, ſhall be allotted to him.

The

The ſtatute does not diveſt the child of any property which has been thus given to him, however unequal it may have been, or how much ſoever it may exceed the reſidue: he may, if he pleaſes, keep it all: if he be not contented, but would have more, then he muſt bring what he has before received, as the law expreſſes it, into hotch pot, that is, into the general maſs of the property to be ſo divided.

This is the clear intention of the act, grounded on that principle of equality [n], to which a court of equity is ever inclined.

[n] 2 P. Wms. 443. 449. 4 Burn Eccl. L. 344. 2 Bl. Com. 190. 517.

Therefore, before a younger child has any claim to a ſhare of the diſtribution, he muſt firſt bring his advancement into hotchpot.

What ſhall conſtitute ſuch advancement, is now to be diſcuſſed.

If a father purchaſe for the ſon an advowſon, or any other eccleſiaſtical benefice, or, if he buy him any office, civil, or military, theſe are held to be ſuch advancements, either partial, or complete, according to the comparative value of the eſtate to be diſtributed [o]. And although the office be only at will, as a gentleman penſioner's place, or a commiſſion in the army, it is regarded in the ſame light [p].

[o] 3 P. Wms. 317. not. (O). Sed. vid. Swinb. p. 3. f 18.

[p] 3 P. Wms. 317. not. (O).

A proviſion

A provision made for a child, by a settlement either voluntary, or for a good consideration, as that of marriage, is an advancement *pro tanto* [r].

[r] 2 P. Wms. 440. 444. 2 Vern. 638.

Nor does the statute extend only to land itself [s], when settled on a younger child by the father, but also to a charge on the land, created by him for the benefit of such child, therefore, if a father settle a rent out of his lands on a younger child, this also is such an advancement as is intended by the statute [t]. Nor is it necessary that the provision should take place in the father's life-time [u]. If, by deed, he settle an annuity, to commence after his death, on such child, it is of the same description [w]. So, a reversion settled on a child, as it is capable of being valued, is of the same nature [x]. A portion secured to a child, although *in futuro*, is also an advancement [y]. And were it only contingent, yet when the contingency has happened, it shall be thus considered [z].

[s] 11 Vin. Abr. 192. 2 P. Wms. 441.

[t] 2 P. Wms. 441.

[u] 2 P. Wms. 440. 445.

[w] 2 P. Wms. 442. Swinb. p. 3. f. 4.

[x] 2 P. Wms. 443.

[y] 2 P. Wms. 445.

[z] 2 P. Wms. 442. 446. 449.

A portion for a daughter to be raised out of lands, on her attaining the age of eighteen, or the day of her marriage, was accordingly held to be an advancement to her when she married, although she were under that age, and unmarried, at the time of the intestate's death [a].

[a] 2 P. Wms. 435.

A portion, also, while contingent, is capable of a valuation, and may, it seems, be brought into hotchpot [a]; or the court may order that, in case the

[a] Per Sir Jos. Jekyll, M. R. arguendo. 2 P. Wms. 442.

the contingency ſhould happen, the portion ſhall be ſo diſtributed as to make the reſt of the children equal with the child on whom it was ſettled [b]. But the contingency muſt be ſo limited as neceſſarily to ariſe within a reaſonable time, as in the above caſe, where the portion was ſecured for the daughter, on her attaining the age of eighteen, or on her marriage [c]. A child advanced in part ſhall bring in his advancement only among the other children; for no benefit ſhall accrue from it to the widow [d]. If a child, who has received any advancement from his father, ſhall die in his father's life-time, leaving children, ſuch children ſhall not be admitted to their father's diſtributive ſhare, unleſs they bring in his advancement, ſince, as his repreſentatives, they can have no better claim, than he would have had if living [e].

[b] Per Lord Raymond, C. J. arguendo. 2 P. Wms. 446.

[c] 2 P. Wms. 440. 445. 449.

[d] 3 Bac. Abr. 77. Prec. Chanc. 182. 184.

[e] 2 P. Wms. 560.

By this ſtatute, although the heir at law ſhall not abate in reſpect of the land, which came to him by deſcent, or otherwiſe, from the inteſtate; yet, if he hath had an advancement from his father in his life-time, out of the perſonal eſtate, he ſhall abate for it in the ſame manner as the other children [f]. And, were it merely the uſe of furniture for his life, it ſhall be regarded as an advancement *pro tanto* [g]. So, where A. on his marriage, covenanted in caſe of a ſecond marriage, to pay his eldeſt ſon, by his firſt wife, five hundred pounds; ſhe died, leaving a ſon, and other children, and A. after a ſecond marriage, died inteſtate; it was decreed, that his heir ſhould bring in the

[f] Com. Dig. Admon. H. 4 Burn Eccl. L. 344. Fitzg. 285.

[g] Com. Dig. Admon. H. Fitzg. 285.

the money, although he were in the nature of a purchaſer, under a marriage ſettlement [h].

[h] 2 Vern. 638.

Co-heireſſes ſhall alſo, it ſeems, bring in ſuch advancement, not being land, as they may have reſpectively received from their father, before they ſhall be entitled to their diſtributive ſhares, agreeably to the principle of the act, and to the object of a juſt and impartial father to promote an equality among his children. [i]

[i] 4 Burn Eccl. L. 344. 2 P. Wms. 440. 443.

Such is the nature of the advancement which will exclude a child from any part of the reſidue. Many benefits, however, may be conferred upon him by his father, which have been held not to be of this deſcription.

Small, inconſiderable ſums of money given to a child, by the father, or mere trivial preſents he may make to the child, as of a gold watch, or wedding clothes ſhall not be deemed an advancement [k], nor ſhall money expended by the father for his maintenance, nor given to bind him an apprentice, nor laid out in his education at ſchool, at the univerſity, or on his travels [l]. Nor ſhall what a child receives out of the *mother's* eſtate, be ſo regarded [m]. Nor, ſhall a proviſion, which a father may make for his child by will, (for a caſe may occur, where a teſtator, may die inteſtate, as to part of his perſonal eſtate,) be conſidered in that light. Nor land given by the father's will to a younger child [n].

[k] 3 P. Wms. 317 not. (o.) 1 Veſ. 16. Ambl. 189. 3 Atk. 528.

[l] 3 Bac. Abr. 76. Swinb. p. 3. f. 18. 2 P. Wms. 449.

[m] 2 P. Wms. 356.

[n] 2 P. Wms. 440. 445.

Such a provision as shall be construed an advancement, must result from a complete act of the intestate in his life time, [n] by which he divested himself of all property in the subject, though as we have just seen [o] it may not take effect in possession till after his death. Still less shall property given or bequeathed to the child by any other person be so denominated [p] and least of all shall a fortune of his own acquisition [q].

[n] 2 P. Wms. 440.

[o] Vid. supr. 298.

[p] 3 Bac. Abr. 76. Swinb. p. 3. f. 18.

[q] Swinb. p. 3. f. 18.

In respect to borough english lands, which descend to the youngest son, it has been held that he should allow for them, on the ground, that the statute intended merely to provide for the heir of the family, that is, the heir by the common law, and not one who is heir only by custom in some particular places [r]. But that decision has been over-ruled, and it is now settled, that such youngest son shall have an equal share of the distribution with the other children without regard to this species of estate: for although the exception in the statute extend only to the eldest son, yet no law exists to oblige the heir in borough english to bring in his lands. The statute contains no such requisition. It speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime [s].

[r] Per Sir Jos. Jekyll, M. R. Stra. 935.

[s] Per Lord Talbot, C. Ca. Temp. Talb. 276. 4 Burn Eccl. L. 345.

Thus must the surplus be distributed in case the intestate has left a wife and children, or representatives of children.

The

The ſtatute then provides, that if there be no children, or legal repreſentatives of them, in exiſtence, a moiety ſhall go to the widow, and a moiety to the next of kindred, in equal degree, and their repreſentatives; but no repreſentation among collaterals ſhall be admitted farther than brothers and ſiſters children. If there be no widow, the whole ſhall go to the children. If there be neither widow nor children, then the whole ſhall be diſtributed among the next of kin, in equal degree, and their repreſentatives, as abovementioned.

The next of kin referred to by the ſtatute are to be traced by the ſame rules of conſanguinity as thoſe who are entitled to letters of adminiſtration [q]. Thoſe rules have been already diſcuſſed [r].

[q] 2 Bl. Com. 515. 2 Veſ. 214.

[r] Vid. ſupr. 60.

The mother, therefore, as well as the father, ſucceeded to all the perſonal effects of the children, who died inteſtate, without wife or iſſue, in excluſion of the other ſons and daughters, the brothers and ſiſters of the deceaſed; and ſuch is the law ſtill with reſpect to the father [s]; but by the ſtat. 1 *Jac.* 2. *c.* 17. *ſ.* 7, if, after the death of the father, and in the life-time of the mother, any of the children die inteſtate, without wife or children, every brother and ſiſter, and their repreſentatives, ſhall have an equal ſhare with her. The principle of which proviſion is this, that otherwiſe the mother might marry, and transfer all to another huſband [t].

[s] 2 Bl. Com. 515, 516. Ambl. 192.

[t] 1 Salk. 251. pl. 2. 1 P. Wms. 48, 49. Lord Raym. 684. Com. Rep. 96. pl. 95.

On

On this laſt mentioned ſtatute it has been held, that if A. die inteſtate, and without iſſue, leaving a wife, and ſeveral brothers and ſiſters, and his mother living, the mother ſhall have no more than an equal ſhare of a moiety of the eſtate with the brothers and ſiſters. And, although there ſhould be no brother, or ſiſter, yet if there be children of a deceaſed brother or ſiſter, they ſhall partake with their grandmother to the ſame extent as their parent would have been entitled [u].

[u] 2 P. Wms. 344. 1 Stra. 710. Gilb. Rep. 189. 1 Atk. 455.

To return now to the ſtatute of diſtributions. That clauſe of it, which expreſſes that there ſhall be no repreſentations among collaterals beyond brothers and ſiſters children, muſt be conſtrued to mean brothers and ſiſters of the inteſtate, and not as admitting repreſentation, when the diſtribution happens to fall among brothers and ſiſters, who are remotely related to the inteſtate; for the inteſtate is the ſubject of the act; it is his eſtate, his wife, his children, and for the ſame reaſon, his brothers' and ſiſters' children, for he is equally correlative to all [x]. Therefore it has been held, that if the brother of an inteſtate hath a grandſon, and a ſiſter has a ſon or daughter, the grandſon ſhall not have diſtribution with the ſon or daughter of the ſiſter [y]. So, it has been decreed, that if an inteſtate leave an uncle, and a deceaſed aunt's ſon, the latter ſhall have no diſtributive ſhare [z].

[x] Raym. 496. 2 Show. 286. 2 Vern. 168. 1 Salk. 250. Ld. Raym. 571. Com. Rep. 87. pl. 56. 1 P. Wms. 25. 595.

[y] 1 Salk. 250. 1 Ld. Raym. 571.

[z] 1 P. Wms. 593.

The words of the ſtatute muſt be taken together. The expreſſion *pro ſuo cuique jure*, will let in any

advantage of equality or preference, which a perſon was entitled to by our law before the ſtatute. Therefore, a grandfather, although he be in an equal degree of conſanguinity with the brother of the deceaſed, ſhall have no ſhare with him in the diſtribution: for by the common law, there was but one degree between brother and brother, and it would be unnatural to carry the perſonal eſtate up to the grandfather, who muſt be preſumed to have been long before provided for, and to be going out of life [a].

[a] Ambl. 191. Vid. ſupr. 63.

So, a grandfather ſhall exclude an uncle; and independently of the proviſions of the ſtatute, by the common law the former was entitled to a preference, as being of the right line, whereas the latter is only of the collateral line; in other words, the grandfather is the root of the kindred, and the uncle is only a branch [b].

[b] 1 Salk. 38. 251. Ld. Raym. 684. Com. Rep. 2d Edit. 96. 108, 109. 12 Mod. 615. 2 Veſ. 215. 1 P. Wms. 41.

The law, of courſe, is the ſame in reſpect to grandmothers, and aunts [c].

[c] Com. Dig. Admon. H. 1 Salk. 38. 251.

Where the next of kin are a grandfather by the father's ſide, and a grandmother by the mother's, they ſhall take in equal moieties, as being in equal degree: for in reſpect of ſuch claims, as hath formerly been obſerved [d], dignity of blood makes no difference [e].

[d] Supr. 64.

[e] 1 P Wms. 53.

Uncles and nephews, aunts and nieces, are in equal degree. And where the inteſtate left two aunts,

aunts, and a nephew, and a niece, children of a deceaſed brother, Lord Hardwicke C. ordered the ſurplus to be divided into four parts equally among them, holding that as they were all in equal degree, the children were to take in their own right, and not by repreſentation, but that if their father had been living, he would have been entitled to the whole [d].

[d] 1 Atk. 454.

The grand-daughter of a ſiſter, and the daughter of an aunt of the inteſtate, are alſo in equal degree, and entitled to equal diſtribution [e].

[e] Com. Dig. Admon. (H.) 1 Vel. 333.

Although the ſtatute direct that no diſtribution ſhall be made till a year has elapſed from the death of the inteſtate, yet, if a perſon entitled to a diſtributive ſhare ſhall die within the year, ſuch intereſt ſhall be conſidered as veſted in him, and ſhall go to his perſonal repreſentative; for this proviſo makes no ſuſpenſion or condition precedent to the intereſt of the parties, but was inſerted merely with a view to creditors.

The ſtatute, alſo, is in the nature of a will, framed by the legiſlature for all ſuch perſons as die without having made one for themſelves; and by conſequence the parties entitled in diſtribution reſemble a reſiduary legatee; and it has been always held, that if ſuch legatee die before the amount of the ſurplus is aſcertained, ſtill his repreſentative

shall have the whole residue, and not the representative of the first testator [f].

[f] 3 Bac. Abr. 75. Carth. 51, 52. Comb. 14. 1 Ld. Raym. 2 Show. 285. Skin. 212. 218. 3 Mod. 58. 11 Vin. Abr. 92. Vid. supr. 268.

Affinity, or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property: as, if A. have a son and daughter, B. and C., and they both die, the former leaving a wife, and the latter a husband; on A.'s dying afterwards intestate, such husband and wife have neither of them any claim on his estate.

If a bastard, or any other person having no kindred, die intestate, without wife or child, his effects, as we have seen [g], belong to the king, who, with the exception of a small part, usually grants them by letters patent, or otherwise; and then such grantee seems of course entitled to the administration, and, consequently, to the sole enjoyment of the property [h].

[g] Vid. supr. 78.

[h] 2 Bl. Com. 505. Doug. 542.

The personal property of an intestate wherever situated, must be distributed according to the law of the country where his domicil was, and such is *primâ facie* the place of his residence, but that may be rebutted or supported by circumstances [i]; for, although, the locality of the party's abode at the time of his death determine the rule of distribution, yet it must be a stationary, not an occasional, residence, in order that the municipal institutions may attach on the property [k]. If, therefore, an Englishman

[i] 2 Ves jun. 198. See also Sir Chas. Douglas's case there cited.

[k] 1 Wooddes. 385. Ambl. 25. 415, 416.

Engliſhman be ſettled and die in this country, and adminiſtration be taken out to him here, debts due to him, or other of his perſonal effects in *Scotland*, or abroad, ſhall be diſtributed according to the law of England [l]: But, if an alien, reſident abroad, die inteſtate, his whole property here is diſtributable according to the laws of the country where he ſo reſides, otherwiſe no foreigner could deal in our funds but at the peril of his effects going according to our laws, and not to thoſe of his own country [m].

[l] 2 Veſ. 35.

[m] 1 Woodd. 385. Ambl. 27.

SECT. II.

Of diſtribution by the cuſtom of London.

I PROCEED in the laſt place to conſider the cuſtoms of the city of London, on this ſubject, and alſo of the province of York, and the principality of Wales; which having peculiar cuſtoms of diſtributing inteſtate's effects, are expreſsly excepted from the operation of the ſtatute.

Although the reſtraints in regard to the power of making wills, which ſubſiſted in thoſe reſpective diſtricts, are now removed by different ſtatutes; namely, the 4 & 5 *W. & M. c.* 2. explained by the 2 & 3 *Ann. c.* 5. for the province of York; the 7 & 8 *W.* 3. *c.* 38. for Wales; and the 11 *G.* 1.

c. 18. for London; by which persons residing in those several places, and liable to those customs, are empowered to dispose of all their personal estates by will, and the claims of the widows, children, and other relations to the contrary, are totally barred; yet those customs remain in full force with respect to such property of an intestate [a]. Their nature and incidents, therefore, now demand our attention.

[a] 2 Bl. Com. 493. 517, 518. L. of Test. 194.

In the city of London [b], and the province of York [c], as well as in the kingdom of Scotland [d], and therefore, probably also in Wales [e]; (respecting the latter of which, little information is to be collected, except from the statute of W. 3.) the effects of the intestate, after payment of his debts, are in general divided according to the ancient doctrine of the *pars rationabilis* [f], to which I have before alluded [g].

[b] Ld. Raym. 1329. 4 Burn Eccl. L. 387.

[c] 4 Burn Eccl. L. 398.

[d] 4 Burn Eccl. L. 421.

[e] 4 Burn Eccl. L. 423, 424.

[f] 2 Bl. Com. 518. Off. Ex. 97.

[g] Supr. 55.

And, first, as to the custom of London, if a freeman of the city die, leaving a widow and children, his personal property, after deducting her apparel, and the furniture of her bed-chamber, is divided into three equal parts, one of which belongs to the widow, another to the children, and the third to the administrator in that character. If only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other [i]. If neither widow nor child, the administrator shall have the whole [k].

[i] 1 P. Wms. 341. 2 Salk. 426. 1 Vern. 132. 2 Vern. 612. L. of Test. 210, 211. 3 Atk. 527.

[k] 3 Show. 175.

The

The portion of the adminiſtrator is ſtyled in law the dead man's part. It is ſo called, becauſe formerly, as we have ſeen [1], the ordinary or his grantee was to diſpoſe of it in maſſes for the deceaſed's ſoul. But, after the diſuſe of this ſuperſtitious practice, the adminiſtrator was wont to apply it to a better purpoſe, that is to ſay, for his own benefit [m], till the legiſlature thought it was capable of an application ſtill better; and accordingly, by the ſtat. 1 *Jac.* 2. *c.* 17. declared, that it ſhould be ſubject to the law of diſtributions.

[1] Supr. 55.

[m] 2 Freem. 85. 1 Vern. 133.

Hence, if a freeman die worth eighteen hundred pounds perſonal eſtate, leaving a widow and two children, this eſtate ſhall be divided into eighteen parts; of which the widow ſhall have eight, ſix by the cuſtom, and two by the ſtatute; and each of the children five, three by the cuſtom, and two by the ſtatute: if he leave a widow and one child only, ſhe ſhall ſtill have eight parts as before; and the child ſhall have ten, ſix by the cuſtom, and four by the ſtatute: if he leave a widow, and no child, the widow ſhall have three fourths of the whole, two by the cuſtom, and one by the ſtatute; and the remaining fourth ſhall go by the ſtatute to the next of kin [n].

[n] 2 Bl. Com. 518. L. of Teſt. 209.

A poſthumous child ſhall come in for his cuſtomary ſhare with the other children [o]. But the cuſtom extends merely to the wife and children of the freeman, and not to his grand-children [p].

[o] Prec. Chan. 499. L. of Teſt. 203. 11 Vin. Abr. 200. Gilb. Eq. Rep. 155.

[p] 1 P. Wms. 341. 1 Vern. 397. 2 Salk. 426. L. of Teſt. 210.

Hence, if a freeman die inteſtate, leaving a wife but no child, yet, if there hath been a child, and there be any legal repreſentatives, that is, lineal deſcendants of ſuch child, they are admitted to his diſtributive ſhare of the dead man's part under the ſtatute, though they are entitled to no part of his ſhare by the cuſtom. In that caſe, therefore, of the dead man's part by the ſtatute, the wife ſhall have one third, and the repreſentatives ſhall have the other two thirds; ſo, that dividing the whole perſonal eſtate into ſix parts, ſhe ſhall have four, and the repreſentatives two.

If there be neither wife nor child, nor ſuch repreſentative of a child, the whole ſhall be ſubject to the ſtatute of diſtributions [o].

[o] L. of Teſt. 192. 221, 222. 1 Vern. 200.

The children of a freeman are entitled to the benefit of the cuſtom, although they were born out of the city [p], and their father neither reſided nor died within it [q].

[p] L. of Teſt. 202. 1 Ventr. 380. 1 Mod. 80.

[q] L. of Teſt. 202 220. 3 Roll. Rep. 316. 1 Sid. 250. 1 Ventr. 180. 1 Mod. 80. 2 Vern. 48. 82. 310.

In reſpect to the widow, I have already mentioned, that ſhe is entitled to her apparel and the furniture of her chamber, which is called the widow's chamber [r]; or in lieu of it, in caſe the eſtate ſhall exceed two thouſand pounds, it has been ſaid, that ſhe is entitled to fifty pounds [s]. The privilege of the widow's chamber is analogous to her right to paraphernalia in general caſes, and, like that, ſhall in no caſe be exerciſed to the prejudice of creditors [t].

[r] 2 Bl. Com. 518.

[s] 7 Vin. Abr. 200. tit. Cuſtoms, (B 2.) Briddle v. Briddle. 4 Burn. eccl. L. 382.

[t] Swinb. p. 6. ſ. 13.

If

If ſhe be provided for by a jointure before marriage in bar of her cuſtomary part, ſhe is put in a ſtate of non-entity with regard to the cuſtom only [u]; but ſhe ſhall ſtill be entitled to her ſhare of the dead man's part, under the ſtatute of diſtributions [w]. But, if the jointure is expreſſed to be in bar of her dower without ſaying more, this ſhall not bar her of her cuſtomary ſhare of the perſonal eſtate, for land is wholly out of the cuſtom [x]. Such alſo is the caſe, if the inteſtate covenant to lay out money in a purchaſe of land, by way of jointure, for the money has in equity all the qualities of land [y].

[u] 2 Vern. 665. 1 P. Wms. 644. 2 P. Wms. 16. 315. 1 Atk. 64. 403.

[w] 1 Vern 15. 2 Chan. Rep. 252.

[x] 1 Eq. Ca. Abr. 158, 159. 1 P. Wms. 531. 647 Prec Chan. 505. L. of Teſt. 214.

[y] 1 P. Wms. 532.

And *à fortiori* ſhe ſhall not be excluded from her cuſtomary ſhare, if the ſettlement be ſo expreſſed; as if it contain a proviſo, that ſhe ſhall not be barred or deprived of her right to dower, or of taking any other gift, proviſion, or bequeſt, her huſband ſhall think fit to give or leave her by deed or will, or any other means whatſoever [z]. On the other hand, the ſettlement may be expreſsly in bar as well of her ſhare of the dead man's part, as of her ſhare by the cuſtom, and then ſhe ſhall be excluded from both [a]. Or if it be made in ſatisfaction of all her demands out of his perſonal eſtate, by the cuſtom or otherwiſe, ſhe ſhall be barred alſo of her ſhare under the ſtatute [b].

[z] 2 Bro. Ch. Rep. 95.

[a] 1 Eq. Ca. Abr. 153. Gilb Eq. Rep. 95 S. C. L. of Teſt. 214.

[b] 7 Vin. Abr. 211. 1 Vern. 15. 4 Burn Eccl. L. 404 Vid. L. of Teſt. 212, 213.

If ſhe be divorced for adultery, *à menſâ et thoro*, ſhe forfeits her cuſtomary ſhare [c].

[c] Bunb. 16.

If

If a freeman leave several children, the share or the orphanage part of any one of them, is not vested in him by the custom till the age of twenty-one, before which period he cannot dispose of it by will, and if he die under that age, whether sole or married, his share shall survive to the others [f]; whereas the share by the statute is vested, and, therefore, such child may devise it at the age of fourteen if a son, and at twelve if a daughter [g]. But in case there be only one child his orphanage part is vested in him, in the same manner as his share by the statute, and is devisable by him at the same age [h].

[f] 2 Bl. Com. 519. 2 Vern. 558.

[g] Vid. supr. 5.

[h] 3 P. Wms. 318. not. (Q.) Vid. also Prec. Chan. 207.

If any of the children are advanced to the full extent of the custom by the father in his life-time, they shall be entitled, by the custom, to no farther dividend [i]. If a freeman have several children, and fully advance them all, the custom, in regard to them, is satisfied, and his personal estate, independent of the widow's customary share, shall be distributed according to the statute. If he has only one child, and fully advances him, the consequence is the same [k]. If the children are advanced only partially, they must bring their portion into hotchpot before they can derive any advantage from the custom; and, in that case, their portion must be so brought in with the other brothers and sisters, but not with their mother, for the principle here also is, to make an equality among the children, and not to benefit the widow [l]. Nor, where a freeman has in part advanced his only child, shall such child

[i] 2 P. Wms. 527.

[k] L. of Test. 206. 221. 2 P. Wms. 527. 1 Vern. 200. 1 Atk. 64.

[l] L. of Test. 204. 1 Vern. 345. 2 Vern. 281. 2 Bl. Com. 519. 2 Freem. 239. 1 Eq. Ca. Abr. 155. 2 P. Wms. 526. Amb. 189.

child bring in his advancement, for there is none to claim with him of equal degree [m]. And where one of several such children is advanced, his advancement shall be in satisfaction merely of his orphanage share, but not of his share of the dead man's part, to the whole of which he shall be entitled, without regard to what he shall have received from his father [n].

[m] 2 Salk. 426. 2 Vern. 234. 628. 754.

[n] 3 Atk. 214. 2 Atk. 523.

In case such advancement be brought into hotchpot, it must be brought into the orphanage part only [o].

[o] 1 Vern. 345.

If the advancement shall have exceeded the child's share by the custom, whether he must bring in such excess before he is entitled to his share of the part distributable by the statute, is a point on which there are opposite opinions. By some writers it has been held, that he has a claim to his full share by the statute, without any retrospect to his advancement, whatever might have been its amount. By others it has been maintained, that he has no right to such distributive share, unless he bring into the same so much of his advancement as exceeded his proportion of his customary part [p]. To reconcile this variance, a distinction has been suggested between an advancement given and accepted expressly in satisfaction of the customary share, and an advancement given generally, without any such agreement or stipulation: That, in the former case, in the distribution of the dead man's part, no respect shall be had to the advancement,

[p] Vid. 4 Burn Eccl. L. 406. 2 Vern. 274.

ment, as it is considered in the light of a purchase by the child, and might have happened to be less, as well as greater, in point of value, than the customary part. But, where there is no such special contract or agreement, and the advancement is general, it shall be applied either to the customary share only, or both to the customary and distributive share, according to the amount of the advancement [q].

[q] 4 Burn Eccl. L. 207.

As to the nature of the advancement, whether complete or partial, it must arise exclusively from the personal estate. In the establishment of the custom the citizens of London had no regard to real property, on supposition, that a freeman would not purchase land, but would employ his whole fortune in commerce [r]. If, therefore, a citizen settle a real estate on a child, it shall be no advancement [s]; nor, although it be expressly for that purpose, shall it bar him of his orphanage part [t]. Nor, if money be given by the father to be laid out in land, to be settled on the son on his marriage, shall it be deemed personal estate, nor any exclusion [u].

[r] 1 Eq. Ca. Abr. 150. 2 Vef. 393.

[s] 1 Ch. Ca. 160. 235. L. of Teft. 194. 1 Vern. 2.

[t] 2 Ch. Ca. 160.

[u] 1 Vern. 345.

What has been already stated in general cases [w] respecting small presents made to the child by the father, his disbursements for the child's maintenance and education, or placing him out apprentice [x], a legacy left him by the father dying partially intestate [y], property given him by any other than his father, as well as a fortune of the child's own

[w] Vid. supr. 300.

[x] Sed Vid. 1 Atk. 403.

[y] Vid. 2 Atk. 277.

own raiſing, is here equally applicable. He is not by any of theſe means advanced. For that purpoſe it muſt be a proviſion made for him by the father, while living, out of his perſonal property [y]. In ſhort, there muſt, in all inſtances of this nature, be a valuable conſideration moving from the father, and an actual benefit accruing to the child [z]. Indeed, it has been made a queſtion, whether ſuch proviſion as ſhall amount to an advancement, ſhould not be made on marriage, or in purſuance of a marriage agreement [a]. But, it ſeems, the cuſtom on this head is not ſo reſtricted, but extends to any other eſtabliſhment of the child in life [b].

[x] Laws of Lond. 82. 1 Vern. 61. 4 Burn Eccl. L. 412. 415. Vid. 1 Veſ. 17. 3 Atk. 213. 452. 8 P. Wms. 317. not. (o). 1 Wilſ. 168.

[y] L. of Teſt. 204. 1 Vern. 61. 89. 216. 3 Atk. 528.

[z] 1 Atk. 403.

[a] 1 Vern. 61. 89. Vid. alſo 3 Atk. 213.

[b] L. of Teſt. 204. 1 Atk. 403.

If the child, whether the only one or not, be married in the life-time of the father, with his conſent, although ſuch child were not fully advanced, yet, to entitle himſelf to a further portion, he muſt produce a writing under his father's hand, expreſſing the value of the advancement, in order that it may be aſcertained what proportion it bore to his ſhare by the cuſtom [c]. If no ſuch writing be produced, or if, on the production of ſuch writing, the ſpecific amount does not appear on the face of it; ſuch advancement ſhall be preſumed to have been complete till the contrary be ſhewn [d]. But mere parol declarations of the father, that he had fully advanced the child, whether with or without a ſpecification of the value, ſhall be of no avail [e].

[c] Ld. Raym. 484. 1 Eq. Ca. Abr. 154. 4 Burn Eccl. L. 393. L. of Teſt. 203. 3 Atk. 451. 452. 527. 1 Atk. 406.

[d] 2 P. Wms. 527. 4 Burn Eccl. L. 408. in not. 3 Atk. 527.

[e] Vid. 1 P. Wms. 634. 2 P. Wms 527. 1 Atk. 407.

Thus

Thus, from what has been ſtated, it appears, that if a freeman die inteſtate, leaving no wife, and an only child, whether the child be fully advanced, or partially advanced, or not advanced; in either of theſe caſes, the child is entitled to the whole perſonal eſtate[h]. If he be fully advanced, he ſhall have nothing by the cuſtom, but ſhall have all as next of kin. If he be partially advanced, ſince he has no brother or ſiſter, with whom to bring his partial advancement into hotchpot, he ſhall have one half by the cuſtom, and the other half by the ſtatute: if he be not advanced, he ſhall have one half by the cuſtom, and the other half by the ſtatute[i].

[h] Vid. 4 Burn Eccl. L. 417.

[i] Vid. 4 Burn Eccl. L. 417.

If the freeman leave no wife, but ſeveral children, as for inſtance, three, one of whom is advanced, another partly advanced, and the third not advanced; in this caſe the child partly advanced, and the child not advanced, after the former has brought in his partial advancement, ſhall ſhare one half equally between them by the cuſtom; and the other half, namely the dead man's part, although the firſt child have been fully advanced, ſhall, without his bringing his advancement into hotchpot, be diſtributed by the ſtatute equally among them all.

If ſuch advancement exceeded his orphanage part, then, whether the exceſs ſhall go in ſatisfaction of his diſtributive ſhare by the ſtatute, or not, ſeems to depend on the proviſion's being expreſsly

preſsly in ſatisfaction of the orphanage part, or whether it be general and without any ſtipulation [h]. Vid. ſupr. 313, 314.

The intereſt, which a child has in ſuch orphanage part, is a mere contingency and no preſent right, and therefore a releaſe of it is not valid in point of law; but, if founded on a valuable conſideration, ſhall operate as an agreement, and be binding in equity [i]. Therefore, a freeman's child, if of age, may, in conſideration of a preſent fortune, waive all claim to the orphanage part: as where the father, on the marriage of his daughter, who had attained twenty-one years, agreed to give her three thouſand pounds, and ſhe covenanted to receive that ſum in full of ſuch ſhare; this, as there was no fraud in the tranſaction, was held in equity to be a good bar of the cuſtom [k]. So, if A. who is of age, marry a freeman's daughter, who is an infant, he may, on receiving an adequate portion, bar himſelf of any future right to the cuſtomary eſtate in virtue of the marriage, by a releaſe of all future right, or by a covenant to releaſe it, when it ſhall accrue [l]. Indeed, if the latter mode be adopted, the wife, if under age, would not be barred by the covenant; and, in caſe of his death before the execution of the releaſe, ſhe would, by ſurvivorſhip, be entitled to her ſhare, as a *choſe* in action not recovered or received by her huſband; but, if he be living when the right accrues, as he clearly may releaſe it, and his releaſe will bind her, therefore it is reaſonable he ſhould perform his covenant. It is highly expedient, that articles of this nature ſhould be

[i] 1 P. Wms. 636. 639. 2 P. Wms. 273.

[k] 2 Eq. Ca. Abr. 272. Stra. 947.

[l] 2 P. Wms. 272. 1 Atk. 63.

carried into execution; and that, when the father is bountiful to his children in his lifetime, he ſhould have his affairs ſettled to his ſatisfaction at his death [m]. But ſuch releaſe ſhall be altogether ineffectual, if in any manner extorted, or obtained by undue influence [n], or without conſideration [o].

[m] 1 Atk. 63.

[n] 2 Atk. 160. 1 P. Wms. 639.

[o] 1 Atk. 63. 402. 2 Atk 161. 1 P. Wms. 639. 2 P. Wms. 273.

Theſe points are, indeed, leſs likely to occur, in conſequence of the authority given to a freeman by the above mentioned ſtat. *Geo.* 1. of diſpoſing, by will, of his whole perſonal eſtate, without regard to the cuſtom.

SECT. III.

Of diſtribution by the cuſtom of York—and of Wales.

THE cuſtom of York, as it regards the widow, varies from that of London only in this reſpect, that ſhe is allowed to reſerve to her own uſe not only her apparel, and furniture of her chamber, but alſo a coffer or box containing various ornaments of her perſon, as jewels, chains, and other articles of the like nature [a].

[a] Off. Ex. Suppl. 61, 62. Swinb. p. 6. ſ. 9.

As relative to children, the cuſtom of York differs in two material points from the cuſtom of London. In the city, as we have ſeen, a child's orphanage part is not fully veſted, till he attains

the age of twenty-one. In the province it is veſted immediately on the death of the inteſtate [b]. In the city, we may remember, the advancement of a child cannot ariſe out of a real eſtate. In the province the heir at common law, who inherits any land either in fee or in tail, is diveſted of all claim to any filial portion [c]. And, however ſmall in point of value the land may be in compariſon with the perſonal eſtate, he is nevertheleſs excluded [d]; and even although the eſtate he inherits be only a reverſion [e]. He is alſo barred, though the land devolved upon him by ſettlement made on his father's marriage [f]. Nor in caſe lands held by a mortgage in fee deſcend to him before redemption, ſhall he be entitled to a filial portion; but on redemption of the mortgage, and payment of the money to the adminiſtrator, it ſeems he ſhall be entitled to ſuch portion, becauſe then he has nothing by inheritance, nor, in fact, has had any preferment [g].

[b] 2 Bl. Com. 519. 4 Burn Eccl. L. 398.

[c] 4 Burn Eccl. L. 409. L. of Teſt 221. 2 Vern. 375.

[d] 4 Burn Eccl. L. 409.

[e] 4 Burn Eccl. L. 409, 410.

[f] 4 Burn Eccl. L. 410. 2 Vern. 375.

[g] 4 Burn Eccl. L. 410.

The principles eſtabliſhed in regard to advancement on the conſtruction of the ſtatute of diſtributions apply in general to ſuch as is purſuant to the cuſtom of this diſtrict [h]; but as here land as well as money conſtitutes an advancement, the heir at law under the cuſtom is excluded by his inheritance of land, either in fee or in tail [i]; whereas ſuch inheritance is no bar by the ſtatute; but, as well under the cuſtom, as under the ſtatute, younger children, in reſpect to advancement, are on the ſame footing. It is eſſential in order to the cuſtom of York's attaching, that the inteſtate ſhould be reſident at the time of his death within the province

[h] Vid. 1 Ves. 17.

[i] 2 Vern. 375.

vince; but for that purpoſe it is immaterial where his eſtate is ſituated.

In caſe a freeman of London ſhall die within the province, the cuſtom of the city for the diſtribution of his effects ſhall prevail, and ſhall controul the cuſtom of the province of York. Therefore in that caſe the heir ſhall come in for a ſhare of the perſonal eſtate: for the cuſtom of the province is only local, and circumſcribed to a certain diſtrict; but that of London, as above ſtated, follows the perſon, although ever ſo remote from the city [i].

[i] 4 Burn Eccl. L. 416. 2 Vern. 47. 82. Supr. 310.

With theſe diſtinctions the cuſtoms of London and thoſe of York in the main agree, and appear to be ſubſtantially the ſame [k].

[k] 2 Bl. Com. 519. 1 Vern. 134. 200. 305. 432. 465. 2 Ch. Rep. 255. L. of Teſt. 221, 222.

Thus, if an inteſtate in the province of York die ſeiſed of an eſtate in fee ſimple, leaving a widow and three ſons. The widow in that caſe ſhall have one-third of the whole perſonal eſtate under the cuſtom, the other third ſhall be divided equally between the two younger ſons, and of the remaining third the widow ſhall take one-third under the ſtatute, and the other two-thirds ſhall be divided equally among the three ſons; for the heir is barred merely of his orphanage part, but not of his ſhare by the ſtatute.

In reſpect to Wales [l], we may learn in general from the ſtat. 7 and 8 *W.* 3. *c.* 38. above referred to [m], that the doctrine of the *pars rationabilis* extends to inteſtate's effects within that principality. But the books contain no farther information on the ſubject.

[l] 4 Burn Eccl. L. 424. Off. Ex 97. in not. Ibid. Suppl. 72.

[m] Supr. 307.

CHAP.

CHAP. VIII.

OF THE POWERS AND DUTIES OF LIMITED ADMINISTRATORS. —— OF JOINT ADMINISTRATORS.

THERE are certain powers and duties which belong in common to all ſpecial and limited adminiſtrators. Whether the adminiſtration be committed *durante minoritate*, *durante abſentiâ*, or *pendente lite*, or whether ſuch ſpecial and limited adminiſtration be granted with or without a will annexed, or in a general or reſtrictive form only, as *ad uſum, et commodum infantis*, they are all inveſted in ſome reſpects with the ſame authority [a]. They may perform all ſuch acts as cannot be delayed without prejudice or danger to the eſtate. They may ſell *bona peritura*, cattle which are fattened, grain, fruit, or any other ſubſtance, which may be the worſe for keeping [b]. They may pay debts which were due from the deceaſed at the time of his death [c], or for the payment of them they may diſpoſe of effects not periſhable [d]. They may alſo in ſuch reſpective characters receive debts due to the deceaſed [e], or may maintain actions for the recovery of the ſame [f]; for, in all theſe and the like inſtances, the urgency of the caſe requires them immediately to act. They have alſo, it ſeems, the privilege of retaining for debts owing to themſelves [g].

[a] 2 P. Wms. 576.

[b] 3 Bac. Abr. 13. 11 Vin. Abr. 102, 103. 1 Roll. Abr. 910. 3 Leon. 278. 2 Anderſ. 132. pl. 78. Cro. Eliz. 718. 5 Co. 29. Godb. 104.

[c] Com. Dig. Admon. F. Vid. Hob 250. 5 Co. 29. b.

[d] 5 Co. 29. b. 2 Anderſ. 132. pl. 78.

[e] Com. Dig. Admon. F. Vid. 3 Leon. 103.

[f] 2 P. Wms. 576. 1 Roll. Abr. 888. 2 Brownl. 83. 1 Salk. 42.

[g] Com. Dig. Admon. F. Semb. Raym. 483.

If administration be granted generally during infancy, the grantee has authority to make leases of any term vested in the infant executor, which shall be good, till he come of age, and, as it has been also held, till he enter [h]. Such administrator has also, it seems, a right, in case the administration were granted with the will annexed, to assent to a legacy [i]. But if the administration were committed with special words of restraint in the form I have just mentioned, such administrator is incapable of making leases [k], or of assenting to a legacy [l]. Nor shall the power of an administrator, during infancy, although the grant were general, extend to the prejudice of the infant. Therefore such administrator has no authority to transfer the property by sale, except in cases of necessity; nor to sell leases even for the payment of debts, if there be other property which he may dispose of to more advantage [m]; nor to assent to a legacy, unless there be assets for its payment [n], nor to release a debt without actually receiving it [o]: for although, as we may remember, if A. an infant, be appointed executor, and B. be nominated to act in that character during A.'s minority, B. seems to be possessed of the same powers as an absolute executor [p]; yet a distinction has been taken between him and an administrator *durante minoritate*. To B. the property in the effects was confided by the owner himself, though but for a limited time and in a special manner, whereas such administrator is appointed by the ordinary in consequence of the legal disability

[h] 6 Co. 67. b. Off. Ex. 215.

[i] Off. Ex. 215. 5 Co. 29. b.

[k] 6 Co. 67. b. Off. Ex. 215.

[l] Off. Ex. 215.

[m] 2 Anderf. 132. pl. 78.

[n] 5 Co. 29. b.

[o] 1 Roll. Abr. 910, 911.

[p] Vid. fupr. 280.

disability of the executor, who by the will is constituted to act immediately [q]. Such acts, therefore, as are performed by such administrator, to the injury of the infant, shall be altogether ineffectual.

[q] Off. Ex. 215, 216. 11 Vin. Abr. 103.

By the stat. 38 *Geo.* 3. *c.* 87. *s.* 7. an administrator *durante absentiâ* has the same powers vested in him as an administrator during the minority of the next of kin.

An administrator *pendente lite*, whether the suit relates to a will, or the right of administration, seems to be on the same footing with an administrator during infancy, to whom the grant is made in the special and limited manner above mentioned [r].

[r] Vid. 3 Bac. Abr. 56. 11 Vin. Abr. 106. 2 P. Wms. 576. & supr. 74.

If an action be brought against a special administrator, and, pending the action, the administration determine, it has been held, he ought to retain assets to satisfy the debt, which is attached on him by the action [s], but that is on the supposition the action does not in that event abate, whereas it seems that such would be the consequence [t]. If judgment be obtained against such administrator, and afterwards the executor come of age, a *scire facias* will clearly lie against the executor on the judgment [u].

[s] 3 Bac. Abr. 14. Comb. 465.

[t] 11 Vin. Abr. 97. Moore 462. Goldsb. 136. Lutw. 342.

[u] Ld. Raym. 265. Carth. 432.

Of co-executors, we have seen, the acts of any one, in respect to the administration of the effects,

are deemed by the law to be the acts of all, inasmuch as they have a joint and entire authority over the whole property; but joint administrators are considered in a different light. Their power arises not from the act of the deceased, but from that of the ordinary; and administration, it has been already stated [s], is in the nature of an office, and, if granted to several persons, they must all join in the execution of it, nor shall the act of one only be binding on the rest. Therefore, one of several administrators cannot, like one of several co-executors, convey an interest, or release a debt, without the others [t].

[s] Supr. 84.

[t] 4 Burn Eccl. L. 272. Lord Bacon's Tracts 262. 1 Atk. 460.

But if one of the administrators die, the right of administering will survive without a new grant [u].

[u] 2 Vern. 514. Supr. 84.

By the stat. 38 *Geo.* 3. *c.* 87. *s.* 4. in case of the absence of an executor for a year after the testator's death, out of the jurisdiction of his majesty's courts, and a suit be instituted in a court of equity by a creditor, the court in which the suit shall be pending, is empowered to appoint persons to collect in outstanding debts, or effects due to the testator's estate, and to give discharges for the same, who are to give security in the usual manner duly to account.

CHAP.

CHAP. IX.

OF ASSETS AS DISTINGUISHED INTO REAL AND PERSONAL, LEGAL AND EQUITABLE——OF MARSHALLING ASSETS.

IN treating of debts and legacies I have hitherto ſuppoſed them to be payable out of the perſonal eſtate only, and, indeed, that is the natural fund for their ſatisfaction: but the real property may alſo be applied to the ſame purpoſe.

On the ſubject of ſuch application it is neceſſary to conſider aſſets under different denominations. Aſſets then are either real or perſonal, legal or equitable [a].

[a] Vid. 4 Burn Eccl. L. 288.

Thoſe of which I have been treating are legal and perſonal.

I proceed now to advert to ſuch as are legal and real. Lands deſcended to the heir in fee ſimple are for the benefit of ſpecialty creditors of this deſcription, as is even an advowſon which is ſo deſcended [b].

[b] 3 Wooddeſ. 483. 3 P.Wms. 401.

Theſe aſſets are ſometimes ſtyled aſſets by deſcent, as perſonal aſſets are called aſſets *enter mains*, that is, in the hands of the executor [c].

[c] Terms of the Law.

Whether an eſtate *pur auter vie*, in caſe it be not deviſed, ſhall be real or perſonal aſſets, depends on there being or not being a ſpecial occupant. The ſtatute of frauds enables the proprietor of ſuch eſtate to deviſe it, and enacts that if no deviſe be made, it ſhall be chargeable in the hands of the heir, if it come to him by reaſon of a ſpecial occupancy, as aſſets by deſcent, as in the caſe of lands in fee ſimple. And, if there be no ſpecial occupant, it ſhall go to the executor, and be aſſets in his hands [d].

[d] 2 Fonbl. 2d edit. 396. not. b. 3 Atk. 466. 4 Term Rep. 229.

A term in groſs is, as we have ſeen, perſonal aſſets[e]. But, if the term be veſted in a truſtee, and attendant on the inheritance, it is real aſſets [f]. So a term in truſt, attendant on the fee in truſt, ſhall be real aſſets in the hands of the heir; for the ſtatute of frauds having made a truſt in fee aſſets in the hands of the heir, the term which follows the inheritance, and which is ſubject to all charges attending the inheritance, muſt be ſo alſo [g].

[e] Supr. 105, 106

[f] 2 Fonbl. 2d edit. 114. not. (r).

[g] 2 Fonbl. 2d edit. 114. not. (s). Hardr. 489. 1 Term. Rep. 766.

Creditors by ſpecialties, which affected the heir, provided he had aſſets by deſcent, had not the ſame remedy againſt the deviſee of their debtor, and were, therefore, liable to be defrauded of their ſecurities. To obviate this miſchief [h], the ſtat. 3 *W. & M. c.* 14. has enacted, that all deviſes of real eſtates by tenants in fee ſimple, or having power to diſpoſe by will, ſhall, as againſt ſuch creditors, be deemed to be fraudulent and void; and that they may maintain their actions jointly againſt

[h] Vid. 2 Bl. Com. 378.

againſt the heir and deviſee. But deviſes for payment of debts, and for raiſing portions for younger children, in purſuance of an agreement before marriage, are expreſsly excepted by the ſtatute [g]. And thus, freehold intereſts deviſed for other than the juſt purpoſes aforeſaid, are become, in favour of ſpecialty creditors, real aſſets at law, without the aſſiſtance of a court of equity; in reſpect to which ſuch creditors may elect to reſort in the firſt inſtance againſt the heir and deviſee, without ſuing the perſonal repreſentative of their deceaſed debtor [h].

[g] Vid. 2 Atk. 292. 2 Veſ. 590. 1 Bro. Ch. Rep. 311. 2 Bro. Ch. Rep. 614. Com. Dig. Aſſets A.

[h] 3 Wooddeſ. 486.

It ſeems, alſo, that an eſtate *pur auter vie*, although no ſpecial occupant were named, would, in caſe it were deviſed, be conſidered as real aſſets [i].

[i] Vid. 2 Fonbl. 2d edit. 396. not. b.

But copyhold eſtates are not aſſets in the hands of the heir [k], and, conſequently, are not comprehended within the proviſions of this ſtatute.

[k] 4 Co. 22. Robinſon v. Tonge, cited 1 P. Wms. 679. not. 1.

Between legal and equitable aſſets the diſtinction is this: legal aſſets are ſuch as conſtitute the fund for the payment of debts according to their legal priority; whereas equitable aſſets are thoſe which can be reached only by the aid of a court of equity, and are ſubject to diſtribution on equitable principles, according to which, as equity favours equality, they are to be divided *pari paſſu* among all the creditors [l].

[l] 3 Bac. Abr. 59. in not. 2 Fonbl. 402. not. d. 4 Burn Eccl. L. 288. 3 Wooddeſ. 486. 2 P. Wms. 416. not. 2.

By

By the ſtat. 21 *H.* 8. *c.* 5. *ſ.* 5. it is enacted, that if lands are deviſed to be ſold, neither the money produced by the ſale, nor the future profits of the land, ſhall be conſidered as forming any part of the perſonal eſtate of the deviſor. But this proviſion was formerly conſtrued to apply merely to deviſes of lands to be ſold by perſons not executors, or by executors in conjunction with other perſons; in which caſes it was held, that neither the land, nor the money was to be regarded as legal aſſets, but merely ſubject to an equitable appointment, inaſmuch as the parties empowered to ſell, were not truſted with it, in reſpect of their executorſhip [k].

[k] 3 Bac. Abr. 58. Roll. Abr. 920. Hob. 265. Dyer 151. b. 264. b. 1 Vern. 63. 2 Vern. 405. 4 Burn Eccl. L. 260. 11 Vin. Abr. 291. Prec. Chan. 127. Sed vid. Off. Ex. 74, 75.

That, in caſe lands were deviſed to an executor, to be ſold by him in that capacity, for the payment of debts and legacies, the money ariſing from the ſale ſhould be legal aſſets as well as the intermediate profits; for that, by the deviſe, the deſcent was broken, and the eſtate in the land veſted in the executor, *quâ* executor for the purpoſes directed by the will [l].

[l] 3 Bac. Abr. 58. 1 Roll. Abr. 920. Hargr. Co. Lit. 236.

But the doctrine of equitable aſſets, in its principle ſo conſonant to natural juſtice, has been gradually extended; and this diſtinction between a deviſe to a truſtee and to an executor, has been continually qualified, till at length it appears to be altogether aboliſhed.

In

In one claſs of caſes, both of an earlier and of a later date, courts of equity recogniſing the union of the two characters of truſtee and of executor in the deviſee, regarded on that ground the real eſtate, as merely a truſt fund, and diſtributable among all the creditors equally [m]. And other caſes conſidered it in the ſame light, although the deviſe were not to the executor expreſsly on truſt, if according to the found conſtruction of the will, he might be converted into a truſtee, as if the deviſe were to him and his heirs; ſince the money could never be legal aſſets in the hands of his heir: nor as againſt ſuch heir could an action be maintained by a creditor [n].

[m] 2 P. Wms. 416. not. 2. 2 Fonbl. 402, 403. 2 Vern. 133. Prec. Chan 408. Moſe. 123. 328. 2 Atk. 50. 2 Bro. Ch. Rep. 94.

[n] 1 Bro. Ch. Rep Append. 7. 1 Bro. Ch. Rep. 135. 138, in not.

According to other deciſions, if the executor had only a naked power to ſell in the capacity of executor, the lands deſcended in the mean time to the heir of the deviſor; and, till the ſale, he might enter and take the profits [o]; and the money ariſing from ſuch ſale, was held to be aſſets at law [p].

[o] Co. Litt. 236.

[p] 1 Bro. Ch. Rep. 135. 138. in not.

But, by modern adjudications, it ſeems to be eſtabliſhed, that a deviſe to a mere executor, ſhall bear the ſame conſtruction as a deviſe to a truſtee: that there is no reaſon to ſuppoſe the teſtator's meaning to be different in the one inſtance from that in the other: and, that even in the caſe of a mere power on the part of the executor to ſell, the deſcent ſeems to be broken, inaſmuch as the vendee is in by the deviſor; but, that whether the deſcent in ſuch caſe be broken or not, the aſſets ſhall be equally

equally equitable; in ſhort, that if the real eſtate be, by any means, given to the executor, the produce of it when ſold, ſhall not be applied in a courſe of legal adminiſtration, but be diſtributed as equity preſcribes [q].

[q] 1 Bro. Ch. Rep. 137, 138. 2 Fonbl. 2d edit. 398 in not. Vid. Hargr. Co. Litt. 113. & not. 2.

And, although it has been held, that where the eſtate deſcends to the heir charged with the payment of debts, it will be legal aſſets in him [r]; yet, now the idea ſeems to prevail, that in this inſtance alſo, the aſſets ſhall be deemed to be equitable [s].

[r] 1 P. Wms. 430. 2 Atk. 290. 2 P. Wms. 416. not. 2.

[s] 2 Fonbl. 2d edit. 398. in not. 1 Bro. Ch. Rep. Append. 6. 2 Bro. Ch. Rep. 94.

But, ſuch aſſets as are clearly legal, ſhall not aſſume, by being recoverable only in equity, an equitable nature. Hence, if a mere truſt eſtate deſcend on the heir at law, notwithſtanding a neceſſity of reſorting to equity to reduce it into poſſeſſion, yet it ſhall be legal aſſets, ſince a truſt eſtate is made aſſets by the ſtatute of frauds. And, although an equity of redemption of a mortgage in fee, not being made aſſets by any legiſlative proviſion, has been conſidered as merely an equitable intereſt, and has been expreſsly adjudged to be equitable aſſets [t]: Yet, there are ſtrong opinions to the contrary; and, that an equity of redemption, even in fee, though capable of being reached only in equity, ſhall be claſſed among aſſets at law. And, although from the ſame inclination of extending the idea of equitable aſſets, it has been alſo held, that if a termor for years mortgage his term, the equity of redemption ſhall be of that deſcription of aſſets [u]. Still, according to a variety of antecedent

[t] 2 Atk. 294. 3 P. Wms. 342. Ambl. 308. 3 Bac. Abr. 59. in not.

[u] 3 P. Wms. 342. Ambl. 308.

antecedent cases, such chattels, whether real or personal, as are mortgaged or pledged by the testator, and redeemed by the executor, although capable of being recovered only in equity, shall be assets at law in the hands of the executor, for the value beyond the sum paid for the redemption [w].

[w] 3 Bac. Abr. 59. in not. 1 Leon. 155. Moore 858. 1 Roll. Rep. 158. 1 Brownl. 76. 2 Atk. 291.

Lands may be devised to an executor, to be sold by him for the payment of debts only, and then they shall be assets merely for that purpose. And, so the devise may be expressed to be for the payment of legacies and not of debts; and then it shall be restricted to the former. For, since the lands are not in their own nature assets, but constituted so by the will and disposition of the devisor, they shall not be assets to a greater extent than he has thought fit to direct [x].

[x] Off. Ex. 74.

But, in either of these cases, as I shall presently shew, the assets may be marshalled.

Where money by a marriage agreement is articled to be invested in land, and settled, such fund shall be bound by the articles, and not be assets, either at law or in equity, for payment of debts [y].

[y] 3 P. Wms. 217.

The marshalling of assets remains now to be considered.

The personal assets of the testator shall in all cases be primarily applied in discharge of his personal debts

debts, or general legacies, unleſs he exempt them by expreſs words, or manifeſt intention[a].

A deviſe of all the real eſtate ſubject to the payment of debts will not alone exonerate the perſonal eſtate; and even if the teſtator direct the real eſtate to be ſold for the payment of debts, the perſonal eſtate ſhall be applied in exoneration of the real[b]; and it ſhall be thus applied, although the perſonal debt be ſecured by mortgage, and whether there be, or be not, a bond or covenant for payment[c]. So, lands ſubject to, or deviſed for, payment of debts ſhall be liable to diſcharge ſuch mortgaged lands, either deſcended, or deviſed[d], and, although the mortgaged lands be deviſed expreſsly ſubject to the incumbrance[e]. So, lands deſcended ſhall exonerate mortgaged lands deviſed[f]. So, unincumbered lands, and mortgaged lands, both being ſpecifically deviſed, but expreſsly after payment of *all* debts, ſhall contribute to the diſcharge of the mortgage[g]. In all theſe caſes the debt is conſidered as the perſonal debt of the teſtator himſelf, and therefore a charge the real eſtate merely collateral.

But a different rule prevails, where the charge is on the real eſtate principally, and the perſonal ſecurity is only collateral[h]: As, where a huſband on his marriage covenants to ſettle lands, and to raiſe a term of years out of them for ſecuring portions, and alſo gives a bond for the performance of the covenant; for in ſuch caſe the land-

holder

[a] 1 P. Wms. 294. not. (2). 2 Atk. 626. 3 Atk. 102. 3 P. Wms. 324. 1 Bro. P. C. 192. Bunb. 302. Ambl. 33. 1 Will. 82. S. C. 1 Bro. Ch. Rep. 444. 454. Prec. Chan. 101. 2 Vern. 718. Ambl. 581. S. C. 1 Bro. Ch. Rep. 445. 456, 457. 2 Bro. Ch. Rep. 60. Vid. alſo 3 Bac. Abr. 85. 2 Fonbl. 290. not. (a).

[b] Bunb. 301. 3 Atk. 202. 3 P. Wms. 322. 2 Eq. Ca. Abr. 493.

[c] 2 Salk. 449. 2 P. Wms. 291. 1 Vern. 36. 3 P. Wms. 360. 2 Atk. 436. 1 Vef. 251. 6 Bro. P. C. 520. 2 Bro. Ch. Rep. 273.

[d] 1 Atk. 487. 1 Bro. Ch. Rep. 240.

[e] 2 P. Wms. 366.

[f] 2 Atk. 424.

[g] 1 P. Wms. 505. 2 Bro. P. C. 1.

[h] 2 P. Wms. 222. 437. 664. in not. 2 Bro. Ch. Rep. 316. 454. 1 Vef. 51. Ambl. 150.

holder enters into such covenant relying on the land to enable him to discharge it; nor does the money raised increase the personal estate, but is to exonerate the rest of his real [h]. So, where the debt, although personal in its creation, was contracted originally by another [i]. As where an estate is bought, subject to a mortgage, the personal estate of the purchaser shall not be applied in exoneration of the real estate, unless he appeared to have intended to make the debt his own [k]; but a mere covenant for securing the debt will not be sufficient for that purpose [l].

[h] 2 Fonbl. 292. not. (b). 2 P. Wms. 435.

[i] 2 Salk. 449. 1 P. Wms. 347 1 Ves. 51. 251. 3 Ves. Ambl. 115. 2 P. Wms. 664. in not. 1 Bro. Ch. Rep. 57, 58. 2 Bro. Ch. Rep. 101. 152. 604.

[k] 2 Fonbl. 202. not (b.) 1 Vern. 36. 6 Bro. P. C. 320. 2 Bro. Ch. Rep. 608.

[l] 2 P. Wms. 664. Ambl. 171. 1 Bro. Ch. Rep. 57. 2 Bro. Ch. Rep. 152. 604.

With respect to the priority of the application of real assets, when the personal estate is either exempt or exhausted, it seems, that first, the real estate expressly devised for the purpose shall be applied; secondly, (to the extent of the specialty debts) the real estate descended; 3dly, the real estate specifically devised subject to a general charge of debts [m].

[m] 1 P. Wms. 294. not. 1. 2 Atk. 424. 3 Atk. 566. 2 Bro. Ch. Rep. 257. 261 in not. 259. in not.

As it is the object of a court of equity, that every claimant on the assets of the deceased shall be satisfied, so far as that purpose can be effected by any arrangement consistent with the nature of the respective claims of creditors, it has been long settled, that where A. a creditor, has more than one fund to resort to, and B. another creditor, only one, A. shall resort to that fund, on which B. has no lien [n]. If therefore a specialty creditor, whose debt is a lien on the real assets, receive

[n] 1 P. Wms. 679. not. (1). 2 Atk. 446. 1 Ves. 312. 2 Ves. 53.

satisfaction out of the personal assets, a simple contract creditor shall stand in the place of such specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt [o].

2 Ch. Ca. 4. Vern. 455. Eq. Ca. Abr. 12. 2 Vern. 63. 2 Atk. 436. 3 Wooddef. 389.

The same marshalling of assets may also take place in favour of legatees. As against assets descended, they shall have the same equity. Thus, where lands are subjected to the payment of all debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of the personal assets [p]. So, where legacies by the will are charged on the real estate, but not the legacies by the codicil, the former shall resort to the real assets on a deficiency of such as are personal to pay the whole [q].

[p] 3 P. Wms. 323.

[q] 3 Ch. Rep. 83. 1 P. Wms. 402. 2 P. Wms. 620.

But the principles of these rules will not admit of their being applied in aid of one claimant, so as to defeat another. And therefore a pecuniary legatee shall not stand in the place of a specialty creditor, as against lands devised, though he shall as against lands descended [r]. Yet such legatee shall stand in the place of a mortgagee, who has exhausted the personal assets, to be satisfied out of the mortgaged premises though specifically devised [s]; for the application of the personal assets in ease of the real estate mortgaged [t] does not take place to the defeating of any legacy [u].

[r] 1 P. Wms. 678. 3 P. Wms. 324.

[s] Ca. Temp. Talb 53. Ambl. 171.

[t] Vid 1 P. Wms. 294.

[u] 1 P. Wms. 693 730. 2 P. Wms. 190. 335.

Nor do any of the rules above mentioned subject any fund to a claim to which it was not before

liable, but only provide that the election of one claimant shall not prejudice the claims of the others [u]. Thus, where A. seised of freehold, and copyhold lands, mortgaged them in his lifetime, and died indebted by mortgage, and on several bonds; the specialty creditors urged the court in marshalling the assets to cast the whole mortgage upon the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate: Yet the court held, that as the copyhold estates were not liable either at law or in equity to the testator's debts farther than he subjected them to the same, the copyhold estate should bear its proportion with the freehold estate for payment of the mortgage, but should not be liable to make satisfaction for the specialty debts [x].

[u] 2 Atk. 438. 1 Ves. 312.

[x] Robinson v. Tonge, cited 1 P.Wms. 679. not. 1.

If a legacy be given out of a mixed fund of real and personal estate, payable at a future day, and the legatee die before the day of payment, it is doubtful whether the court will marshal the assets, so as to turn such legacy on the personal estate; in which case, it would be vested and transmissible; but, as against the real estate, it would sink by the death of the legatee [a].

[a] 1 Atk. 402. & Pearce v. Taylor, before Lord Thurlow, C. Trin. vac. 1790. cited 1 P.Wms. 679. not. 1.

As against real assets descended, the wife shall stand in the place of specialty creditors for the amount of her paraphernalia [b]; but, whether she shall be so entitled as against real assets devised, is a point unsettled [c].

[b] 1 P. Wms. 729. 3 Atk. 369. 393.

[c] 2 P. Wms. 544. not. 1. Ambl. 6. 3 Atk. 438. 3 Bac. Abr. 87. 2 Ves. 7. Vid. supr. 180.

A court of equity will not marſhal aſſets in favour of a charitable bequeſt, ſo as to give it effect out of the perſonal chattels, it being void ſo far as it touches any intereſt in land [d].

[d] 2 Veſ. 52. Ambl. 614. 704. 713. 3 Wooddeſ. 489. not. (g).

CHAP.

CHAP. X.

OF A DEVASTAVIT.

HAVING thus discussed what belongs to the discharge of an executor's duty, I am now to consider, what shall amount to such a violation, or neglect of it, as shall make him personally responsible.

This species of misconduct is styled in law a devastavit; that is, a wasting of the assets [a].

[a] Off. Ex. 157. 3 Bac. Abr. 77. Com. Dig. Admon. I. 1. 11 Vin. Abr. 306.

An executor may incur this charge in a variety of modes, not only by plain and palpable acts of abuse, as giving away, embezzling, or consuming the property without regard to debts, or legacies; but also by misapplying it in extravagant expences in the funeral [b]; in the payment of debts out of their legal order, to the prejudice of such as are superior; or by an assent to, or payment of a legacy, when there is not a fund sufficient for creditors [c].

[b] Vid. supr. 192.

[c] Off. Ex. 158.

So if the executor release, or cancel a bond due to the testator, or deliver it to the obligor, this shall charge him to the amount of the debt, whether in point of fact he received it or not [d]. If he release a cause of action, accrued in right of the testator,

[d] Off. Ex. 159.

whether before, or ſubſequent to the teſtator's death; this alſo will be a *devaſtavit*[e]. If he ſubmit to arbitration, a debt, or any other demand he may be entitled to in right of the teſtator, and the arbitrator do not award him a recompence to the full value, this, as being his own voluntary act, ſhall bind him to anſwer the difference[f]. If an executor take an obligation in his own name, for a debt due by ſimple contract to the teſtator, he ſhall be equally chargeable as if he had received the money; for the new ſecurity has extinguiſhed the old right, and is *quaſi* a payment[g]. If, in the character of an executor, he commence an action, in which he has a right to recover, and afterwards agree with the defendant to receive a ſpecific ſum at a future day, as a compenſation, and the party fail to pay it, the executor, in that caſe, is liable on a *devaſtavit* for the value[h]. Thus, where the executor of an obligee took in payment a bill of exchange, drawn on a banker, for the money, who accepted the bill, and before payment failed: on the executor's afterwards bringing an action on the bond, and this matter being diſcloſed in evidence, it was held to be a payment[i]. So, if an executor pay money in diſcharge of an uſurious bond, or any other uſurious contract entered into by the teſtator, it ſhall involve him in the ſame conſequences[k].

Such acts alſo of negligence, and careleſs adminiſtration, as tend to defeat the rights of creditors or legatees, fall under the ſame denomination. As if

[e] Off. Ex. 71. 159 Hob. 66. Andr. 138. Cro. Eliz. 43.

[f] Off Ex. 71. 159, 160. 3 Leon. 51.

[g] Yelv. 10. 2 Lev. 189. Keilw. 52.

[h] 2 Lev. 189. 2 Jon. 88. S.C. 1 Vern. 474.

[i] 3 Bac. Abr. 78. in not. et vid. 1 Vern. 474.

[k] Hob. 167. Noy 129.

if the executor delay the payment of a debt, payable on demand with intereſt, and ſuffer judgment for principal and intereſt incurred after the teſtator's death; unleſs he can ſhew that the aſſets were inſufficient to diſcharge the debt immediately [l], he ſhall be held guilty of a *devaſtavit*.

[l] 2 Lev. 40.

If an executor loſe any of the teſtator's chattels, he ſhall be reſponſible for their value [m]. And, in a caſe where the executor had loſt a bond due to the teſtator, the court of chancery was inclined to charge him with the debt; but, directed only, that he ſhould proſecute a ſuit inſtituted by him againſt the obligor, with effect, in order to recover the money on the bond, and reſpited judgment in the mean time [n]. If the executor apply merely by an attorney to the obligor of a bond to pay the debt, but bring no action, he ſhall be charged with the amount of it [o]. He ſhall, in like manner, be perſonally anſwerable, if, by delaying to commence an action, he has enabled a creditor of the teſtator to avail himſelf of the ſtatute of limitations [p].

[m] Vid. 2 Vern. 299.

[n] 2 Vern. 299.

[o] 3 Bac. Abr. 60. 2 Bro. Ch. Rep. 156.

[p] 12 Mod. 573. 11 Vin. Abr. 309.

If an executor appoint an agent to collect the teſtator's effects, and the agent embezzle them, it ſhall be a *devaſtavit* by the executor [q]. If a term be aſſigned by an executor in truſt, to attend an inheritance, it ſhall, in equity, follow all the eſtates created out of ſuch inheritance, and all the incumbrances ſubſiſting upon it; but, as by ſuch aſſignment, the term ceaſes to be aſſets at law, the executor ſhall be reſponſible to the creditors for a *devaſtavit* [r].

[q] 6 Mod. 93.

[r] 3 P. Wms. 330. 1 Term Rep. 763.

If an executor retain money in his hands for any length of time, which, by application to the court of chancery, or, by veſting in the funds, he might have made productive, he ſhall be charged with intereſt upon it [s].

[s] 2 Fonbl. 2d edit. 184. not. p. 2 Vern. 744. 1 Bro. Ch. Rep. 375. 3 Bro. Ch. Rep. 73. 433.

If he ſell the teſtator's goods at an under value, although it be an appraiſed value [t]; or, if he delay diſpoſing of them, by which they are injured, he is perſonally bound to make a compenſation [u]. If he omit to ſell the goods at their full price, and, afterwards, they are taken out of his hands, he ſhall be liable to the extent of the value of the goods, and not merely to what he recovers in damages; for there was a default on his part [w]. But if, without any imputation on him, the goods are taken out of his poſſeſſion, although he recover not ſuch damages, as the goods were really worth, he ſhall be reſponſible for no more than he recovers [x]. If the goods be periſhable, and, on his part, there has been neither neglect in keeping them, nor delay in ſelling them; in caſe they are impaired, he ſhall not anſwer for their firſt value, but only for what they were worth at the time of the ſale. Yet, if the goods be taken out of his poſſeſſion, he muſt ſue the party taking them, that he may exempt himſelf from any greater claim, than the damages he ſhall recover [y].

[t] Off. Ex. 158.

[u] 6 Mod. 181, 182.

[w] 6 Mod. 181.

[x] 6 Mod. 181.

[y] 6 Mod. 181.

In caſe of an executor's inveſting money in the funds, and appropriating the ſame, he ſhall not be anſwerable for a loſs by the fall of ſtocks [z]. Nor,

[z] 2 Fonbl. 2d edit. 184. not. p. 3 Bro. Ch. Rep. 147. 433. Vid. alſo 2 Bro. Ch. Rep. 231.

as

as it ſeems, ſhall he be ſo liable, although, without the indemnity of a decree, he lend money on a real ſecurity, which at the time there was no reaſon to ſuſpect [a]. An executor has alſo an honeſt diſcretion to call in a debt bearing intereſt, if he conceive it to be in hazard [b]. If an executor merely give a receipt for ſo much due on a bond, as he in fact receives, he ſhall not be charged with a *devaſtavit* for the reſidue [c]. Nor is a converſion of the goods of the teſtator to his own uſe a *devaſtavit*, if he pay debts of the teſtator to the value with his own money [d]. Nor is he ſo liable if he pay a debt of an inferior nature out of his own purſe to the amount of the teſtator's effects in his hands, for they remain equally liable to the claim of the ſuperior creditor, and may equally be ſeized at his ſuit in execution in ſpecie, as the teſtator's property [e]. Nor, if the executor compound an action of trover for the goods of the teſtator, and take a bond for the money payable at a future day, does that act neceſſarily amount to a *devaſtavit*, as the money, for which the bond is taken, is aſſets immediately [f]. But he ſhall be charged, as we have ſeen [g], in caſe there be a failure in the payment of it. If there be arrears of rent on a leaſe, and, on the tenant's becoming inſolvent, the executor releaſe the arrears, and give him a ſum of money to quit poſſeſſion; in caſe he appear thus to have acted for the benefit of the eſtate, he ſhall be allowed both [h].

[a] 1 P. Wms. 141.

[b] 2 Fonbl. 2d edit. 186. not. (q). 1 Bro. Ch. Rep. 361. Sed vid. Moſel. 98.

[c] Com. Dig. Admon. I. 2. Off. Ex. 159.

[d] 1 Saund. 307. Vid. ſupr. 185.

[e] 1 Saund. 218.

[f] 2 Lev. 189.

[g] Supr. 338.

[h] 3 P. Wms. 381.

If an executor become bankrupt, having waſted the aſſets, the *devaſtavit* may be proved under the commiſſion [h].

[h] Cooke's B.L. 4th Edit. 134.

If the huſband of an executrix commit a *devaſtavit*, in caſe the executorſhip commenced before the marriage, they ſhall both be chargeable. If it commenced ſubſequent to the marriage, the huſband is liable alone. If an executrix commit a *devaſtavit*, and afterwards marry, the huſband, we have ſeen, as well as the wife, is reſponſible during the coverture [i]. A *devaſtavit* by one executor ſhall not charge his companion [k]; and, if there be ſeveral adminiſtrators, each ſhall be liable only for what he receives [l]. Formerly, the executor of an executor could not be charged by a *devaſtavit* committed by the firſt executor, although to the prejudice of the king, for it was held to be a *tort* [m], and therefore to die with the party. But, by the ſtat. 4 & 5 *W. & M. c.* 24. *ſ.* 12. an executor of an executor ſhall be liable on a *devaſtavit* committed by his teſtator, in the ſame manner as he would have been if living.

[i] 2 Bro. Ch. Rep. 323. Vid. ſupr. 281.

[k] Off. Ex. 161, 162. Dyer 210. 3 Bac. Abr. 31.

[l] Barnes 440.

[m] 3 Leon. 241. 2 Bro. Ch. Rep. 324.

CHAP.

CHAP. XI.

OF REMEDIES FOR, AND AGAINST EXECUTORS, AND ADMINISTRATORS, AT LAW, AND IN EQUITY.

SECT. I.

Of remedies for executors and adminiſtrators at law.

BEFORE I conclude, it will be neceſſary to conſider firſt what remedies, either at law, or in equity, executors or adminiſtrators are entitled to, in right of the deceaſed; and then, ſecondly, what remedies may be had againſt them.

In regard to the firſt of theſe points, the ſubject has been in a great meaſure anticipated by the diſcuſſion of the executor's intereſt in the teſtator's *choſes in action*[a], the exiſtence of which neceſſarily ſuppoſes a remedy to give it effect.

[a] Vid. ſupr. 120.

From, what has been already ſtated, it appears that the executor repreſents the teſtator in reſpect to all his perſonal contracts; therefore, he may maintain ſuch actions to enforce them as might have been maintained by the teſtator himſelf[b]. Thus, an executor may have an action on a debt due to the teſtator by judgment, ſtatute, recognizance, obligation, or other ſpecialty[c]. So he is entitled

[b] 3 Bac. Abr. 59. 91. Cro. Eliz. 377. Latch, 167. Roll. Abr. 912. Off. Ex. 65.

[c] Com. Dig. Admon. B. 13.

entitled to an action of debt, ſuggeſting a *devaſtavit* in the life-time of his teſtator, on a judgment recovered by ſuch teſtator againſt an executor [c]. So the executor of the aſſignee of a bail bond ſhall have an action upon it [d]. So an executor may maintain an action on a bond, though conditioned for the performance of an award [e]. He may, alſo, have an action on a covenant entered into with the teſtator to perform a perſonal thing [f]; and even on a covenant that touches the realty, as for aſſuring lands, if it were broken in the teſtator's life-time, and in ſuch caſe damages ſhall be recovered by the executor, although he be not expreſsly named [g]; for, ſince the teſtator was entitled to an action of covenant for ſuch breach, and to recover damages as the principal remedy, and not merely acceſſary, the law devolves ſuch remedy on the executor; but if waſte be committed by the leſſee, in the life-time of the leſſor, after his death, his heir can have no action for the waſte, becauſe he cannot recover treble damages: Nor can the executor have it, for he has no right to recover the place waſted, the inheritance of which has deſcended on the heir [h].

[c] 1 Salk. 314. Mod. Ca. 126. Ld. Raym. 971. 1502. Vid. 3 Term Rep. 685.

[d] Fort. 367.

[e] 2 Ventr. 249.

[f] Latch. 168.

[g] Com. Dig. Admon. B. 13. Covenant, B. 1. 3 Bac. Abr. 91. 2 Lev. 26. Ventr. 175. Off. Ex. 65.

[h] Off. Ex. 65. Com. Dig. Waſt. C. 3. 2 Inſt. 305.

The executor may, alſo, in right of the teſtator, maintain an action on ſimple contracts, in writing, or not in writing, either expreſs or implied [i], and even on contracts for the benefit of a third perſon [k]. He may, likewiſe, have an action for a relief due to the teſtator [l]. And, purſuant to the ſtat. 13 *Ed.* 1. *Weſt.* 2. *c.* 23. an executor is entitled to an

[i] Com. Dig. Admon. B. 13. 3 Bac. Abr. 59. 92. 3 Term Rep. 660.

[k] Al. 1.

[l] Noy 43. Cro. Eliz. 883.

action of account, on an account with his teſtator [m]; but this ſpecies of remedy in the courts of law is fallen into diſuſe. He may, alſo, by the expreſs proviſion of the ſtat. 4 *Ed.* 3. *c.* 7. have an action of treſpaſs for the taking of the teſtator's goods: And, although, the ſtatute ſpeak only of the carrying away of goods, yet its operation is not confined to that ſpecific treſpaſs, which is named merely for an example; but it has been held, as we have ſeen [n], to comprehend other injuries to the teſtator's perſonal eſtate [o]: therefore, on this ſtatute, an action will lie for treſpaſs with cattle on his leaſehold premiſes [p], or for cutting corn though growing on his freehold lands, and carrying it away at the ſame time [q]. So, by the like equity of this ſtatute, an executor may maintain an action of trover, for the converſion of the teſtator's goods in his life-time [r]; or an action of debt on the ſtat. 2 & 3 *Ed.* 6. *c.* 13. for not ſetting out tithes due to the teſtator [s]; or a *quare impedit*, in caſe he died within ſix months after the uſurpation [t]; and, it ſeems, that, under this ſtatute, an executor may maintain ejectment for an *ouſter* of the teſtator, although he were ſeiſed in fee, becauſe, in ſuch caſe, the executor may proceed in that form of action for damages only [u], in the ſame manner as a leſſee where the leaſe expires pending the ſuit [w].

By the common law an executor is entitled to an action of replevin for goods diſtrained in the teſtator's life-time [x]; or to an action of detinue for any

[m] Com. Dig. Admon. B. 13.

[n] Supr. 120. 121.

[o] Com. Dig. Admon. B. 13. Semb. Latch. 168.

[p] Off. Ex. 67, 68.

[q] 1 Ventr. 187.

[r] Moore 400. Cro. Eliz. 377. Latch. 168. 1 Anderſ. 242. 1 Leon. 193, 194. 1 Ventr. 30.

[s] 1 Sid. 88. 407. 4 Mod. 404. 1 Salk. 314. 1 Ventr. 30. 3 Bac. Abr. 91. in not.

[t] Off Ex. 66, 67. Sav. 94. Latch. 168. Noy 87. Poph. 189. 4 Leon. 15.

[u] 3 Bac. Abr. 92. 1 Ventr 30. 3 Term Rep. 13.

[w] 3 Term Rep. 16. argdo. Co. Litt. 285. Stra. 1056.

[x] 1 Sid. 82. Latch. 168. Off. Ex. 66. Gilb. L. of Diſtr. 3d edit. 156.

any ſpecific chattel; or to bring ejectment to recover land held for a term of years; for, in thoſe inſtances, the thing itſelf is the object of the action, and the property continues in the plaintiff [y].

y Latch. 168. Off. Ex. 65.

He may, likewiſe, avow for rent in arrear at the teſtator's death, as incident to a reverſion for years, which devolved upon him as executor [z].

z Com. Dig. Diſtreſs, A. 2. 1 Roll. Abr. 672. 1 Salk. 302. 307. 2 Show. 254.

An executor ſhall alſo have an action againſt a ſheriff for the eſcape of a party in execution on a judgment obtained by the teſtator, even where the eſcape happened in the teſtator's life-time [b]. So he may have an action againſt the ſheriff for not returning his writ, and paying money levied on a *fieri facias* [c], or for a falſe return, ſtating that he had not levied the debt, when in truth he had [d]. So the executor of a landlord may maintain an action againſt an officer for removing goods taken in execution before the payment of a year's rent [e]. So, in the character of an executor, he may have a writ of error [f]. And it has been held that he may have ſuch writ to reverſe the teſtator's attainder of high treaſon, inaſmuch as the executor is privy to the judgment, and may be damnified by it; but, on the other hand, it has been inſiſted, that though the reverſal reſtore the blood and land, it is of no avail to the executor, ſince the goods are forfeited by the conviction, and not by the attainder [g]. An executor is likewiſe entitled to the remedies

b Com. Dig. Admon. B. 13. Cro. Car. 297. Dyer 322. Vid. Ld. Raym. 973.

c 1 Roll. Abr. 913. Cro. Car. 297.

d 4 Mod. 404. 1 Salk. 12. Comb. 322, 323. 1 Ld. Raym. 40. 3 Bac. Abr. 98.

e Stra 212.

f Latch. 167.

g 1 Salk. 295. pl. 1. Vid. 4 Bl. Com. 387.

remedies by action of diſceit, by *audita querela*, or *identitate nominis* [f].

[f] Latch. 167. Off Ex. 71. 3 Bac. Abr. 60.

He may alſo ſue in that character in a court of conſcience [g].

[g] Dougl. 246.

And by the ſtat. 11 *Geo.* 2. *c.* 19. *ſ.* 15. above referred to [h], an executor of tenant for life, on whoſe death any leaſe determined, ſhall recover of the leſſee a juſt proportion of rent from the laſt day of payment to the death of ſuch leſſor.

[h] Supr. 161.

[i] Com. Dig. Admon. B. 13. Latch. 168, 169. 1 Anderſ. 243. Jon. 174.

But an executor has no right to an action for an injury to the perſon of the teſtator as for a battery, impriſonment, or the like [i]; nor for a prejudice to his freehold, as for felling his wood, or cutting and carrying away his graſs: for wood, and graſs growing are parcel of the freehold [k], and conſequently in ſuch caſe the heir, and not the executor, is the party injured. Yet if the lord of a manor aſſeſs a fine on a copyholder for his admittance, and die, his executor may bring an action for it; for it does not depend on the inheritance, but is like a fruit fallen [l].

[k] 1 Ventr. 187. Jon. 174. Off. Ex. 67, 68.

[l] 3 Bac. Abr. 92. Carth. 90. 3 Mod. 239. 3 Lev. 261. Comb. 151. Show. 35. Ld. Raym. 502. 3 Burr 1717. accord.

The executor may alſo in right of the teſtator maintain actions, the cauſe of which accrued after the teſtator's death [m], as in caſe a bond given to the teſtator be forfeited after that event [n]; or a perſonal covenant entered into with the teſtator be broken [o]; or a debt on any other ſpecies of contract made with him, become payable [p]; or his goods

[m] Com. Dig. Pleader, (2. D. 1.) 3 Leon. 212.

[n] 3 Bac. Abr. 93. 1 Roll Abr. 602.

[o] Off. Ex. 82. 11 Vin. Abr. 231. L. of Ni. Pr. 158.

[p] 1 Term Rep. 487. 4 Term Rep. 565. Com. Dig. Pleader, (2. D. 1.) 3 Bac. Abr. 94. Reg. 140. 5 Co. 31. b. Cro. Car. 225. 1 Lev. 250.

be taken [q]; or treſpaſs committed on his leaſehold premiſes [r]; in all theſe, and the like inſtances, the executor in his repreſentative capacity is entitled to a remedy by action.

So, if the teſtator died poſſeſſed of a term for years in an advowſon, it veſts, as we have ſeen [s], in his executor; and, therefore, in caſe of his being diſturbed, he may maintain a *quare impedit* [t]. So, an executor may have an action of replevin for goods taken after the death of the teſtator [u]. An executor may alſo avow for rent accrued due after that time, as incident to a reverſion for years, which veſted in him in that character [w].

If a defendant in execution on a judgment recovered by the teſtator, eſcape after the teſtator's death, the executor ſhall have an action againſt the ſheriff for the eſcape [x], as he ſhall, alſo, in caſe the defendant were in execution on a judgment recovered by him as executor [y].

So, a bail-bond may be aſſigned to the executor of a deceaſed plaintiff, and he may bring an action upon it [z]: or a bill of exchange may be indorſed to A. as executor, and he may, in that character, maintain an action on the bill againſt the acceptor [a]. And, in like manner, an executor may bring an action on any other contract made with him in his repreſentative capacity [b].

An

[q] 4 Bac. Abr. 93. in not. 94. 1 Roll. Abr. 602. Lane 80. 6 Mod. 92.

[r] Com. Dig. Admon. B. 13. Off. Ex. 70.

[s] Vid. ſupr. 106.

[t] Off. Ex. 36.

[u] Off. Ex. 36.

[w] Com. Dig. Admon. B. 9. 1 Salk. 302. 307. 11 Vin. Abr. 204. 2 Show. 254. Vid. ſupr. 346.

[x] 3 Bac. Abr. 57. Off. Ex. 46. Godb. 262. Vid. ſupr. 346.

[y] 1 Roll. Rep. 276. 1 Ld. Raym. 35. 2 Term Rep. 128.

[z] Forteſ. 370.

[a] 1 Term Rep. 487.

[b] Com. Dig. Pleader, (2. D 1.) Cro. Car. 685. Roll. Abr. 602. 3 Bac. Abr. 93.

An executor may hold to bail on an affidavit of his belief of the existence of the debt, for the nature of his situation will not admit of his being more positive [b]. Therefore, if an executor swear to the books of the testator, and that he believes them to contain a true account, and the debt to be still unpaid, it shall be sufficient [c]. But, an affidavit by an executor, that the defendant was indebted to his testator in fifty pounds, as appears by the testator's books, was held defective, and common bail ordered [d].

[b] 1 Term Rep 716. 3 Bac. Abr. 101.

[c] 1 Crompt. Prac. 40.

[d] 1 Crompt. Prac. 40. Stra. 1219.

It is a general rule, that an executor, when plaintiff, shall pay no costs, for he sues in *auter droit*, and the law does not presume him to be sufficiently cognisant of the nature and foundation of the claims he has to assert [e]. Therefore, if an executor bring an action of trover on a conversion in the testator's life-time, he shall not be liable to costs [f]. Nor shall he be liable, if the trover were in the testator's life-time, and the conversion after his death [g]. Nor, shall he pay costs in an action, for a debt due to his testator in his life-time [h]. Nor, in an action for a debt due on a contract made with the testator, which became payable after his death [i]. Nor shall an executor be subject to costs on a writ of error, on a judgment recovered against the testator [k]: for, in all these instances, it is necessary for him to sue in his representative character, and expressly to name himself executor. But, if he may bring the action in his private capacity, there, if he fail, he shall be liable to costs; as in an action

[e] 3 Bac. Abr. 100. Cro. Jac. 228. Yelv. 168. 1 Roll. Rep. 63. Carth. 281. 4 Mod. 244. 3 Lev. 375. Skin. 400.

[f] 4 Term Rep. 277.

[g] 4 Term Rep. 281.

[h] 4 Term Rep. 280.

[i] 2 Lord Raym. 1413. Stra. 682. Vid. 4 Term Rep. 278.

[k] 3 Lev. 375. Vid. 4 Term Rep. 280.

action for trover and converſion ſubſequent to the teſtator's death [l]: Or, if he bring an action for money belonging to the teſtator's eſtate, had, and received by the defendant, after the death of the teſtator [m]: Or, if he bring an action on a bond, executed to him by the defendant, for ſecuring a debt due to the teſtator by ſimple contract [n]: Or, if he fail by his own miſpleading [o]: Or, if he bring a writ of error, where he was liable to coſts in the original action [p]: In all theſe caſes, the cauſe of action accrues to him perſonally; and, therefore, like every other plaintiff, he ſhall be ſubject to coſts. Nor, ſhall he be exempt, by naming himſelf executor in an action, when he is under no neceſſity to do ſo: otherwiſe, he might in all caſes indiſcriminately evade the payment of coſts [q]. If, in an action at the ſuit of an executor, the defendant pay money into court, the effect of it will not be to make the plaintiff liable to pay, but only to loſe his coſts, in caſe he proceed, and fail to recover a farther ſum [r].

[l] 3 Bac. Abr. 100 Savil. 134. Latch. 220. 1 Ventr. 92. Hutt. 78. Salk. 314. 7 Term Rep. 358. Vid. 4 Term Rep. 279.

[m] 5 Term Rep. 234.

[n] Vid. 4 Term Rep. 280.

[o] 6 Term Rep. 654.

[p] 1 H. Bl. Rep. 566.

[q] 3 Bac. Abr. 100. 11 Mod. 256. Vid. 4 Term Rep. 280.

[r] 3 Bac. Abr. 100. 2 Salk. 596. 2 Stra. 796.

Before the ſtat. 38 *Geo.* 3. *c.* 87. an infant of the age of ſeventeen, was capable of taking out probate, and, therefore, of maintaining an action as executor; but, during his minority, he was obliged to ſue by guardian, or *prochein amy*; and could not ſue by attorney.

But, as by this ſtatute, probate ſhall not be granted to him, till he ſhall have attained the full age of twenty-one years; he cannot, in his repre-

-ſentative

ſentative capacity, ſuſtain an action before that period.

If a married woman be executrix, the huſband cannot ſue in right of the teſtator without the wife [r].

[r] Com. Dig. Admon. D. Off. Ex. 207, 208.

An executor named during the minority of another, has the ſame right to bring actions as an abſolute executor [s].

[s] Com. Dig. Admon. F. Semb. Off. Ex. 215, 216.

As executors, in their repreſentation of the teſtator, make but one perſon, they muſt all join in the bringing of actions in his right [t]; although ſome have omitted to prove the will, or have even refuſed before the ordinary [u].

[t] 3 Bac. Abr. 32. Off Ex. 95, 100. Godolph. 134.

[u] Off. Ex. 42. Com. Dig. Abatement, E. 13. Pleader, (2 D. 1.) 9 Co. 37. 1 Lev. 161. Vid. ſupr. 21, 23.

If an infant be co-executor with other perſons of full age, he muſt, I apprehend, join with them in an action, and they ſhall altogether ſue by attorney, for ſuch was the law before the ſtatute, with regard to an infant under the age of ſeventeen [w].

[w] 3 Bac. Abr. 618. 1 Roll. Abr. 288. Cro. Eliz. 278. 2 Saund. 212, 213. 1 Ventr. 102. 1 Sid. 449. Carth. 124.

If A. and B. be appointed executors, and A. refuſe to join in ſuch action, B. may commence the action in the name of them both; and, then, on ſummoning A. there ſhall be judgment of ſeverance; that is to ſay, that B. ſhall ſue alone: or, on A.'s default on the ſummons, there ſhall be the ſame judgment; and B. then may proceed in the action, and recover in his own name only: otherwiſe, a co-executor, by colluſion with the

debtor, might prevent his being ſued for the debt [x]. By the death of the party ſevered, the writ ſhall not abate [y]. Nor, if he live till judgment, can he ſue out execution, becauſe the recovery is in the name of the other executor alone [z].

[x] 3 Bac. Abr. 33. Cro. Car. 420. 2 Roll. Abr 98. Off. Ex. 98, 99.

[y] Cro. Eliz. 652. Co Litt. 139.

[z] Off. Ex. 105, 106.

If a judgment be recovered by two executors, and the one prays a *capias*, and the other a *fieri facias*; it has been ſaid, the *capias* ſhall be awarded as moſt beneficial for the eſtate [a].

[a] 3 Bac. Abr. 33. in not. Hob. 61. Vid. 1 Atk. 460.

By ſtat. 25 *E.* 3. *c.* 5. the executor of an executor is put on the ſame footing, in regard to the bringing of actions, as an immediate executor [b].

[b] Vid. Off. Ex. 257. Godb. 262.

An executor, *de ſon tort*, is not entitled to bring any action in right of the deceaſed. As he comes in by wrong, he is liable to all the trouble of an executorſhip, without any of its privileges [c].

[c] 2 Bl. Com. 507. 2 P. Wms. 583. vid. ſupr. 287.

An adminiſtrator may, in right of his inteſtate, maintain actions in the ſame manner, as an executor in right of his teſtator [d].

[d] Com. Dig. Admon. B. 13. Off. Ex. 259.

All ſpecial and limited adminiſtrators likewiſe, may maintain actions in right of their reſpective inteſtates. And, indeed, the principle, on which the ordinary has the power of granting ſuch adminiſtrations, is, that there may be a perſon capable of recovering property belonging to the eſtate [e].

[e] 2 P. Wms. 576. 6 Co. 67. b.

If

If an adminiſtrator *durante minoritate* bring an action and recover, and then his adminiſtration determine by the executor's coming of age, ſuch executor may have a *ſcire facias* on the judgment [f].

[f] 3 Bac. Abr. 18; 1 Roll. Abr. 888, 889. Cro. Car. 127. 1 Lev. 181. 1 Vern. 25.

So, if ſuch adminiſtrator obtain judgment, he may bring a *ſcire facias* againſt the bail, nor can they object that the executor has attained the age of twenty-one; for the recognizance is to the adminiſtrator himſelf by name [g]. But, it ſeems to be a queſtion, whether in ſuch caſe, he or the executor ſhall ſue out execution on the judgment [h].

[g] 3 Bac. Abr. 18; 2 Lev. 37.

[h] 2 Lev. 37.

If there be ſeveral adminiſtrators, they muſt, like co-executors, all join in an action [i].

[i] Com. Dig. Abatement, E. 14. Pleader, (2 D. 10.)

If a judgment, after verdict, be recovered by an executor or adminiſtrator, in ſuch caſe an adminiſtrator *de bonis non*, is by ſtat. 17 *Car.* 2. *c.* 8. entitled to ſue a *ſcire facias*, and take out execution on ſuch judgment.

In caſe a party died ſeiſed of a rent ſervice, rent charge, rent ſeck, or fee farm, in fee-ſimple, fee-tail, or *pur auter vie* in the life-time of *ceſtui que vie*, the common law afforded no remedy to recover the arrears due at the time when the owner of ſuch rents died. It was therefore enacted by the ſtat. 32 *H.* 8. *c.* 37. [k], that the executors and adminiſtrators of tenants in fee, fee-tail, or for life, of ſuch rents, may have an action of debt for all ſuch

[k] Vid. 3 Bac. Abr. 91. 2 Bac. Abr. 282. in not. 4 Burn Eccl. L. 268.

arrears, or may diſtrain for the ſame upon the lands chargeable, ſo long as they remain in the poſſeſſion of the tenant, who ought to have paid the rents; or of any other perſon, claiming under him by purchaſe, gift, or deſcent. The ſtatute alſo provides, that a tenant *pur auter vie*, his executors and adminiſtrators may, after the death of *ceſtui que vie*, have an action of debt, or may diſtrain for ſuch arrears incurred in the lifetime of *ceſtui que vie*.

Before the paſſing of this act, the inconvenience did not exiſt to the ſame extent, in regard to the executor of tenant for his own life, or to the executor of tenant *pur auter vie*, after the death of *ceſtui que vie:* for, by the common law, an executor in either of thoſe caſes, had a remedy, by action of debt, for the arrears of rent which had accrued in the lifetime of the teſtator[l]; but, it has been adjudged, that the ſtatute being remedial, applies to the executors of all tenants for life; not merely to ſuch executors, as, previouſly to the ſtatute, had no remedy whatever, but alſo to thoſe who were entitled to an action of debt, to whom, therefore, it gives merely the additional remedy of diſtreſs[m]. Yet, although the executors of all tenants for life, be authoriſed by the ſtatute to diſtrain for ſuch arrears[n], it ſeems, that rent reſerved on a leaſe for years, is not within its proviſions, inaſmuch as the landlord is not tenant in fee, fee-tail, or for life, of ſuch a rent; and the executors of ſuch tenants only are mentioned in the act[o]. However, in treſpaſs, where

[l] Hargr. Co. Litt. 162. not. 4. Gilb. L. of Diſtreſs, 3d edit. 33.

[m] Hargr. Co. Co. Litt. 162. b. not. 1. Ld. Raym. 172. Cro. Eliz. 322. L. of Ni. Pr. 5th edit. 56. Gilb. L. of Diſtreſs, 3d edit. 33. Sed vid. Cro. Car. 471.

[n] Ld. Raym. 172.

[o] L. of Ni. Pr. 5th edit. 57. Gilb. L. of Diſtreſs, 3d edit. 34.

where it appeared the defendant had diſtrained the plaintiff's goods, for rent due to his teſtator on a leaſe for years, Lee, C. J. held it to be comprehended by the ſtatute, and the defendant obtained a verdict [p].

[p] Powel v. Killick, at Weſtminſter, M. 25 Geo. 2.

Nor does the ſtatute extend to the executor of the grantee of a rent-charge, for a term of years, if he ſo long live [q]: Nor to copyhold rents, but only to rents out of free land [r].

[q] L. of Ni. Pr. 5th edit. 57.

[r] 2 Bac Abr. 282. in not. Yelv. 135. Sed vid. Carth. 91.

But, the executor of an executor, is held to be within the equity of this ſtatute [s].

[s] Off. Ex. 258.

An executor may alſo prove a debt due to the teſtator under a commiſſion of bankruptcy [t].

[t] 2 Bro. Ch. Rep. 610.

In caſe a commiſſion has been ſuperſeded, the executors of the party, againſt whom it iſſued, may take out a commiſſion for a debt due to him; but, if it has not been ſuperſeded, they have no ſuch right; for the debt having veſted in his aſſignees, the executors are incapable of being the petitioning creditors [u].

[u] 1 Atk. 100.

Executors, in their repreſentative character, may ſign a bankrupt's certificate [w]. And, even where the bankrupt's father being principal creditor, choſe himſelf ſole aſſignee, and dying inteſtate, the bankrupt, as his repreſentative, choſe himſelf aſſignee, and ſigned his own certificate, it was held regular [x].

[w] Cooke's B.L. 4th edit. 497. 1 Atk. 85.

[x] Cooke's B.L. 4th edit. 498. Green 269.

But, an executor, who has alſo a claim in his own right, cannot ſign in both capacities [y].

[y] 1 Atk. 85.

If the bankrupt's eſtate pay a clear dividend of ten ſhillings in the pound, his repreſentatives are entitled to the allowance [z].

[z] Cooke's B.L. 4th edit. 533. 2 Atk. 208, 209. 3 Atk. 814.

If the executor of a trader only diſpoſe of the ſtock in trade, it will not make him a trader, or ſubject to a commiſſion of bankruptcy. Thus, where the executor of a wine-cooper found it neceſſary to buy wines to refine the ſtock left by the teſtator, this was held not to conſtitute him a trader [a]. But, in caſe the teſtator direct the reſidue of his eſtate to be employed in carrying on his trade, ſuch reſidue ſhall be liable to all the debts of the trade. And, it ſeems, that in caſe the executor ſhall thus carry it on, he may be a bankrupt, although his name do not appear, and will be perſonally reſponſible for the debts [b].

[a] Cooke's B.L. 4th edit. 67. 1 Atk. 102.

[b] Cooke's B.L. 4th edit. 67. in not,

SECT. II.

Of remedies for executors and adminiſtrators in equity.

AN executor or adminiſtrator is alſo entitled to all the equitable intereſts of the deceaſed, and may, in his repreſentative capacity, enforce them in a court of equity [a].

[a] Vid. Com. Dig. Chancery, (2 B. 1.) (3 G. 1.)

Such

Such intereſt, veſted in the teſtator, ſhall veſt in the executor, although he be not named; as if a legacy be given to A. and, if he die under age, to B. and C. or the ſurvivor of them; and, firſt, B. die, then C., and, laſtly, A. die under age; the legacy ſhall be decreed to the executor of C. who ſurvived B [b].

[b] Com. Dig. Chancery, 3 G. 2 Ventr. 347.

Partners in trade are joint tenants in the whole ſtock and effects, not merely in that particular ſtock in being at the time of entering the partnerſhip, but continue ſo through all its changes. And, therefore, in caſe of the death of one partner, the whole property at law veſts in the ſurvivor. But, in equity, ſuch ſurvivor is conſidered merely as a truſtee for the repreſentatives of the deceaſed, to the extent of his ſhare; on which they have a ſpecific lien, although the ſurvivor ſhould afterwards die, or become bankrupt [c].

[c] 1 Veſ. 242.

If, pending a ſuit, the plaintiff die, his executor may continue it by bill of revivor, and have the full benefit of the proceedings [d].

[d] Mitf. 63, 64

If the executor find the affairs of the teſtator ſo complicated, as to render the adminiſtering of the eſtate unſafe, he may inſtitute a ſuit againſt the creditors, for the purpoſe of having their ſeveral claims adjuſted by the decree of the court [e]. But ſuch bill will not entitle him to an injunction to reſtrain any creditor from proceeding againſt him at law: for that purpoſe, it is neceſſary, that there

[e] Com. Dig. Chancery. 3 G. 6. 2 Fonbl. 2d edit. 408. not. (t). 2 Vern. 37.

be a ſuit or decree, by and on behalf of the creditors of the teſtator[f].

[f] 2 Fonbl. ibid.

If two executors are plaintiffs in equity, and one of them is excommunicated, the other may be ſevered, and the defendant ſhall anſwer him[g]. One executor may ſue his co-executor in equity[h]. In caſe of a ſuit by co-executors, the proceedings do not abate by the death of one of them[i].

[g] Prac. Reg. in Chan. 2d edit. 209.

[h] Prac. Reg in Chancery, 2d edit. 209. Vid. 11 Vin. Abr. 363 365.

[i] 3 Bac. Abr. 32.

[i] Hinde's Prac. in Chan. 47.

If a temporary executor prove the will, and afterwards his executorſhip determine, the ſubſequent executor may maintain a ſuit without another probate[k].

[k] Prac. Reg. 2d edit. 209. 3 Ch. Ca. 265.

An adminiſtrator ſhall be relieved in chancery againſt a fraud to his adminiſtration. As if the grant be wrongfully obtained, and afterwards repealed on citation, an aſſignment of a term by the grantee in truſt for himſelf, ſhall be revoked and avoided by the ſubſequent adminiſtrator[l].

[l] 2 Ch. Ca 129. Com. Dig. Chancery, (2 B. 1.)

If a bill be brought by an adminiſtrator *durante minoritate*, and, pending the ſuit, the executor come of age, he may continue the ſuit by a ſupplemental bill[m].

[m] Mitf. 61.

In caſe an adminiſtration be determined by death, a bill of revivor, by a ſubſequent adminiſtrator, has been admitted[n].

[n] Mitf. 61. in not. 2 Vern. 237. 2 Eq. Ca. Abr. 3, 4.

SECT.

SECT. III.

Of remedies at law againſt executors and adminiſtrators.

I AM now, in the laſt place, to treat of the remedies againſt executors and adminiſtrators, or the means which the law preſcribes to enforce the performance of their various duties.

As repreſentatives of the deceaſed they are anſwerable, whether expreſsly named or not, as far as they have aſſets for all his debts, covenants, and other contracts [a]. An executor is thus liable for all debts due from the teſtator by judgment, ſtatute, recognizance, obligation, or other debts by record or ſpecialty [b].

[a] 3 Bac. Abr. 95. Off Ex. 117, 118 Cro. Car. 187. Jon. 223. Yelv. 103.

[b] Com. Dig. Admon. B. 14. Off. Ex. 118.

So, an action of debt lies againſt the executor of a ſheriff, on a judgment recovered againſt the teſtator, for an eſcape [c].

[c] Dyer 322.

So, an action may be maintained againſt an executor on other inferior debts of record, as iſſues forfeited, fines impoſed at the aſſizes, quarter ſeſſions, by commiſſioners of ſewers, or bankrupts, by ſtewards in leets, or the like [d].

[d] Com. Dig. Admon. B. 14. Off. Ex. 118.

He

He is, alſo, ſubject to an action on the teſtator's obligation; or on his covenant, as to pay rent [e], or to repair premiſes [f]. An executor may, likewiſe, be ſued by the lord of the manor for a relief due from the teſtator [g]. So, an action lies againſt an executor on ſimple contracts of the teſtator, either in writing or by parol, either expreſs or implied, as on bills of exchange and promiſſory notes, debt for rent on a parol leaſe [h], or *aſſumpſit* for money had and received by the teſtator to the plaintiff's uſe [i]. So, an action may be maintained by a gaoler againſt an executor for proviſions found for the teſtator in priſon [k]: Or againſt the executor of a ſheriff, who levied money on a *fieri facias*, and died before he paid it [l]: Or, as it ſeems, againſt an executor on a collateral promiſe by the teſtator [m], as, where he promiſed to give A. a ſum of money in conſideration that he would marry B.

In ſhort, in all caſes where the cauſe of action is money due, or a contract to be performed, gain or acquiſition of the teſtator, by the work and labour or property of another, or a promiſe of the teſtator, expreſs or implied, the action ſurvives againſt the executor. But, where the cauſe of action is a *tort*, or ariſes *ex delicto*, ſuppoſed to be by force and againſt the king's peace, there the action dies, as, battery, falſe impriſonment, treſpaſs, ſlander, nuiſance, diverting a watercourſe, eſcape, or on a penal ſtatute, and many other caſes of the like kind [n].

Such

[e] Salk. 297. Sti. 387. 406. Com. Dig. Covenant, C. 1.

[f] Carth. 519. Salk. 309. Ld. Raym. 553.

[g] Com. Dig. Admon. B. 14. Noy 43, 44.

[h] Com. Dig. Admon. B. 14.

[i] 9 Co. 89. b. 10 Co. 77. b. Cro. Car. 294. Plowd. 182.

[k] 9 Co. 87. b.

[l] Com. Dig. Admon. B. 14. 1 Roll. Abr. 921. Jon. 430. Mar. 13.

[m] Com. Dig. Admon. B. 14. 1 Roll. Rep. 14. Cro. Jac. 404. 3 Bul. 2. 6. Sti. 158. Ow. 56, 57. Palm. 329. Jon. 16.

[n] Com. Dig. Admon. B. 15. Off. Ex. 127, 128. Hambly v. Trott, Cowp. 375.

Such are the ſpecies of actions which ſurvive againſt an executor, or die with the perſon, on account of the *cauſe* of action. But there are other ſpecies of actions which ſurvive, or die in reſpect of the *form*.

In ſome actions the defendant could have waged his law as in debt on a ſimple contract, and, therefore, no action in that form lies againſt an executor; but now other actions are ſubſtituted in their room, on the very ſame cauſe, which ſurvive, and may be maintained againſt him.

No action, where in form the declaration muſt be *quare vi et armis, et contra pacem*, or where the plea muſt be, that the teſtator was not guilty, will lie againſt an executor.

On the face of the record the cauſe of action ariſes *ex delicto*, and all private criminal injuries or wrongs, as well as all publick crimes, are buried with the offender.

But in moſt, if not in all the caſes, another action may be brought, which will anſwer the purpoſe. An action, on the cuſtom of the realm, againſt a common carrier, is for a *tort* and ſuppoſed crime, the plea is not guilty, and, therefore, an action will not lie againſt an executor; but *aſſumpſit*, which is another action for the ſame cauſe, is maintainable. So, if a man take a horſe from another, and bring him back again, an action of treſpaſs

treſpaſs will not lie againſt the executor, though it would have lain againſt the party himſelf. But an action for the uſe and hire of the horſe will lie againſt the executor [o]. Nor is the executor chargeable for the injury done by his teſtator in cutting down another man's trees; but, for the benefit ariſing to his teſtator from the value or ſale of the trees, he may be called upon to anſwer [p]. Nor will trover lie againſt an executor for a converſion by his teſtator; for in that caſe the form of the plea is, that the teſtator was not guilty, and the iſſue is to try the guilt of the teſtator: But if the teſtator ſold the property in his life-time, his executor ſhall be charged in an action for money had and received by the teſtator to the plaintiff's uſe.

[o] Cowp. 375.

[p] Cowp. 376.

The fundamental diſtinction then, is this: If it is a ſort of injury, by which the offender acquires no gain to himſelf at the expence of the ſufferer; as, for example, beating or impriſoning a man, there the perſon injured has only a reparation for the *delictum* in damages to be aſſeſſed by a jury, and, therefore, the executor is not liable: But, where, beſides the crime, property is acquired which benefits the teſtator, there, an action for the value of the property ſhall ſurvive againſt the repreſentative [q].

[q] Cowp. 376, 377.

The executor is alſo liable on contracts of the teſtator, although the cauſe of action accrue not till after his death; as on a bond which becomes due, or a note payable, ſubſequent to that event [r].

[r] Com. Dig. Pleader, (2. D. 2.)

The

The liability of an executor to the payment of rent incurred after the teſtator's death, has been already conſidered [s].

[s] Vid. ſupr. 218. et ſeq.

In the caſes which I have been enumerating the executor ſhall be liable only to the amount of the aſſets [t]. But there are caſes in which he ſhall be perſonally reſponſible *de bonis propriis*; as if he commit any of thoſe acts which conſtitute a *devaſtavit*, on its being duly ſubſtantiated, he muſt anſwer out of his own eſtate for the value of what he has waſted [u]. An executor may alſo make himſelf chargeable in his private capacity to a plaintiff's demand, by pleading a plea, the falſehood of which lies in his own knowledge, and which, if true, would be a perpetual bar to the action [w]. Therefore, if an executor plead *ne unques executor* that he never was executor [x], or plead a releaſe made to himſelf [y], and it is found againſt him, the judgment ſhall be in the alternative *de bonis teſtatoris et ſi non de bonis propriis*. An executor may alſo make himſelf perſonally liable by his promiſe to pay a debt of the teſtator, or anſwer damages out of his own eſtate; but purſuant to the ſtatute of frauds ſuch promiſe muſt be by ſome note or memorandum in writing, ſigned by him, or ſome other perſon by his authority [z]: There muſt alſo be a ſufficient conſideration to ſupport the promiſe: It muſt be alleged, and proved, that aſſets were come to his hands; or that, in conſideration the creditor would forbear to ſue him, he promiſed to pay the debt [a]: Or an admiſſion of aſſets muſt be implied from

[t] 9 Co. 88. b.

[u] Com. Dig. Admon. I. 3. 3 Bac. Abr. 77. Off. Ex. 157. 164.

[w] Off. Ex. 185. 3 Bac. Abr. 87. 1 Roll. Abr. 930. Godolph. 198. 11 Vin. Abr. 383. 1 Bl. Rep. 400.

[x] 1 Roll. Abr. 930. 933.

[y] Cro. Jac. 671, 672.

[z] Vid. Cowp. 289.

[a] Cro. Eliz. 91. 1 Vef. 125. cited Cowp. 293.

from the nature of the promiſe itſelf, as where the defendant owned the money lay ready for the plaintiff whenever he would call for it [b]: In all theſe caſes the executor ſhall be liable to the ſame ſpecies of judgment. Forbearance to ſue, although the remedy be only in equity, is a ſufficient conſideration [c].

[b] Camden v. Turner, cited Cowp. 293.

[c] 3 Bac. Abr. 90. 1 Sid. 89. 1 Lev. 71. 1 Roll. Rep. 27.

But, in caſe there be no aſſets, a promiſe by an executor to pay a debt of the teſtator is *nudum pactum* [d].

[d] 5 Term Rep. 8.

Nor ſhall an executor's paying intereſt on a bond due from the teſtator be conſidered as an admiſſion of aſſets for the principal [e]. Nor ſhall an executor's merely ſubmitting to an award amount to an admiſſion of aſſets [f]. But if the executor bind himſelf by a perſonal engagement to perform the award; or if his ſubmiſſion to arbitration be a reference not only of the cauſe of action, but alſo of the queſtion, whether he has, or has not, aſſets, and the arbitrator award the executor to pay the amount of the plaintiff's demand, it is equivalent to determining as between the parties, that the executor had aſſets to pay the debt. The defendant therefore is concluded by the award, although it will not operate as an admiſſion of aſſets in any other litigation; and he may be attached for non-payment [g].

[e] 5 Term Rep. 8.

[f] 5 Term Rep. 4.

[g] 1 Term Rep. 691. 5 Term Rep. 7. 2 Term Rep. 455.

According to a modern deciſion an action may be maintained in a court of common law againſt an executor

executor in that character on his expreſs promiſe to pay a legacy in conſideration of aſſets [h]. And, in another caſe, it was alſo ruled, that on the ſame promiſe, grounded on the ſame conſideration, an action will lie againſt an executor perſonally in his own right [i].

[h] Atkins v. Hill, Cowp. 284.

[i] Hawkes v. Saunders, Cowp. 289.

But this doctrine has been very much ſhaken by a ſubſequent adjudication. It is true, that in the caſe on which it was founded the executor had not, as in the two former inſtances, *expreſsly* promiſed to pay the legacy; yet two of the three learned judges, who decided it, reaſoned on general principles, and denied the juriſdiction of the courts of common law over the ſubject of legacy, without reference to any diſtinction between an expreſs and an implied promiſe. They held, that policy and convenience forbad the courts of common law to entertain this ſpecies of action, ſince they can impoſe no terms on the party ſuing; whereas courts of equity in ſuch ſuits interfere in a manner highly beneficial to private families; as on a bequeſt of a legacy to the wife they require the huſband to make an adequate ſettlement on her, as the condition of his recovering it [k]: But, if he might reſort to an action, the wife and children would, in a variety of inſtances, be left deſtitute of all proviſion. They alſo obſerved, that the only other precedent of ſuch an action occurred in the time of the uſurpation; and the reaſon there aſſigned for allowing it, was to prevent a failure of juſtice, as the eccleſiaſtical courts were at that time aboliſhed, and the

[k] Vid. 3 P. Wms. 202, & ſupr. 251.

court of chancery did not then take cognizance of legatory matters [l].

Although an executor be entitled, as we have ſeen [m], to ſue in a court of conſcience, he is not liable to be ſued there. The legiſlature could not intend to give to ſuch a court an authority to enquire into the conduct of executors, and to take an account of aſſets [n].

Executors and adminiſtrators ſhall not in general be held to bail, for they are not perſonally liable, but only in reſpect of the aſſets. It were unreaſonable to ſubject them to an arreſt in their repreſentative capacity [o]. But they may be held to bail, if it appear that they have waſted the property [p]. Yet a bare ſuggeſtion of a *devaſtavit* is not ſufficient for that purpoſe without the oath of the plaintiff [q]. So where on a judgment againſt an executor execution is ſued out, and the ſheriff returns a *devaſtavit*, in an action of debt on the judgment the executor may be required to put in ſpecial bail [r]. Where an executor has perſonally promiſed to pay a debt, it ſeems he may be holden to bail on ſuch promiſe [s].

An executor defendant ſhall pay coſts in all caſes in which the plaintiff prevails. And the judgment for the coſts is *de bonis teſtatoris ſi, et ſi non, de bonis propriis* [t]. An executor defendant ſhall have coſts in caſe of a judgment in his favour [u].

Before

[l] Deeks v. Strutt, 5 Term Rep. 690. Vid. alſo Fariſh v. Wilſon, Peake's Ni. Pr. Rep. 73. See 4 Bac. Abr. 446. in not.

[m] Supr. 347.

[n] Dougl. 263.

[o] 3 Bac. Abr. 101. Cro. Jac. 350. Yelv. 53. Cro. Car. 59. Litt. Rep. 2. 1 Crompt. Prac. 29.

[p] 1 Crompt. Prac. 29. 1 Lev. 39. Carth. 264. 1 Mod. 16.

[q] 3 Bac. Abr. 101. 1 Crompt. Prac. 101.

[r] 3 Bac. Abr. 101. Comb. 206. 1 Sid. 63.

[s] Mackenzie v. Mackenzie, 1 Term Rep. 716.

[t] 3 Bac. Abr. 100. Plowd. 183. Hardr. 165. Cro. Eliz. 503. Hutt. 69.

[u] 3 Bac. Abr. 100.

Before the ſtat. 38 *Geo.* 3. *c.* 87. an infant executor, after he had attained the age of ſeventeen, might have been ſued, in which caſe he was to appear by guardian, and not by attorney, when the ſame judgment might have been recovered againſt him as againſt any other executor [w]; but in conſequence of that act, till he comes of age he is neither capable of ſuing, nor liable to be ſued.

[w] 3 Bac. Abr. 9. 618. 1 Roll. Abr. 287, 288. Poph. 130. Cro. Jac. 420. 1 Roll. Rep. 380.

A limited executor is alſo ſubject to be ſued during the continuance of his office [x].

[x] Vid. Off. Ex. 215, 216.

In an action againſt a married woman executrix the huſband muſt be joined [y]. On a judgment againſt huſband, and wife executrix, if ſhe ſurvive, an action of debt does not lie ſuggeſting a *devaſtavit* by the huſband; for although, in caſe ſhe married after the teſtator's death, ſhe is anſwerable for the waſting by the huſband [z], yet ſhe ſhall not be charged *de bonis propriis* for the coſts recovered againſt him [a].

[y] Com. Dig. Admon. D. Off. Ex. 203. 207. 3 Bac. Abr. 9.

[z] Vid. ſupr. 281.

[a] Com. Dig. Admon. (I. 3.) 2 Lev. 161.

If there be ſeveral executors, they muſt be all ſued [b], in caſe they have all adminiſtered. But ſuch as have not adminiſtered may be omitted [c]: for although executors themſelves muſt be conſcious how many are named by the will, and muſt, as we have ſeen, frame their action accordingly; yet creditors and ſtrangers are bound to take notice of ſuch executors only, as in fact execute the office. If one only confeſs a judgment, it ſeems now ſettled that it ſhall not bind nor conclude

[b] 3 Bac. Abr. 32. Off. Ex. 95.

[c] 3 Bac. Abr. 32. 1 Lev. 161. 1 Sid. 242.

the reſt [d]. If they plead diſtinct pleas, it is ſaid, that ſhall be received which is beſt for the eſtate, or moſt deciſive of the queſtion [d]. Of co-executors, if ſome are of full age, and others infants, the action may be againſt them all; but the latter cannot appear with the others by attorney, but muſt appear by guardian [e].

[d] Off. Ex. 98. Vid. ſupr. 282.

[d] Off. Ex. 98. 3 Bac. Abr. 53. Godolph. 136. 2 Atk. 460. & vid. ſupr. 282.

[e] 3 Bac. Abr. 13. 619. Yelv. 130. Styl 318. vid. 3 Mod. 216. 2 Stra. 784.

It is clearly ſettled, that one executor ſhall not be charged with the *devaſtavit* of his companion, and ſhall be liable only to the extent of the aſſets, which came to his hands [f]. The teſtator's having miſplaced his confidence in one executor ſhall not operate to the prejudice of the others [g].

[f] 3 Bac. Abr. 31. Off. Ex. 161, 162. Godolph. 134.

[g] Cro. Eliz. 318.

An executor of an executor ſhall, as I have already mentioned, purſuant to the ſtat. 4 & 5 *W.* & *M. c.* 24. ſ. 12. be charged on a *devaſtavit* committed by his teſtator in the ſame manner as ſuch teſtator would have been if living [h]. But although, as we have ſeen [i], an action of debt may be maintained by A. an executor, ſuggeſting a *devaſtavit* in the lifetime of his teſtator on a judgment, recovered by ſuch teſtator againſt B. alſo an executor; yet in ſuch caſe it ſeems as againſt B.'s executor, a *ſcire facias* is requiſite, inaſmuch as he was not privy to the judgment [k].

[h] Vid. Com. Dig. Admon. (I. 3.) 3 Bac. Abr. 99. Off. Ex. 259. 3 Mod. 113. 2 Bro. Ch. Rep. 324. Vid. ſupr. 342.

[i] Supr. 343, 344.

[k] Salk. 314. Ld. Raym. 971.

An executor *de ſon tort* is liable to the action of the lawful executor or adminiſtrator, or to that of a creditor; and, in the latter caſe, may be charged

as executor generally [l]. If there be alſo a lawful executor, they may be joined in an action by a creditor, or ſued ſeverally [m]; but, it is otherwiſe, if there be a lawful adminiſtrator, he cannot be ſo joined with an executor *de ſon tort* [n]. If a creditor take out adminiſtration, he may recover his debt againſt him, who, before the grant, was executor *de ſon tort*, as well as the goods of the inteſtate, taken or converted previouſly to the ſame [o].

[l] Com. Dig. Admor. C. 1. Carth. 104. Off. Ex. 177. 5 Co. 31.

[m] Off. Ex. 178.

[n] Off. Ex. 178.

[o] Com Dig. Admor. C. 3. Sti. 384.

A party, as we have ſeen [p], may be an executor *de ſon tort* of a term, and is chargeable for waſte committed by him on the demiſed premiſes [q]. If an executor *de ſon tort* be guilty of that, or any other ſpecies of *devaſtavit*, or plead *ne unques executor*, and it be found againſt him, he ſhall be charged as another executor *de bonis propriis* [r]: but, in general caſes, he is liable only to the amount of the aſſets which come to his hands [s].

[p] Supr. 19.

[q] 3 Lev. 35. Off. Ex. Suppl. 102.

[r] Off. Ex. 157.

[s] Dyer 166. b. not. 11.

By the ſtat. 30 *Car.* 2. *c.* 7. made perpetual by the ſtat. 4 & 5 *W.* & *M. c.* 24. above referred to, the executor of an executor, in his own wrong, is chargeable on a *devaſtavit* by his teſtator, in the ſame manner as ſuch teſtator would have been, if living [t].

[t] Vid. Com. Dig Admon. I. 3.

But, it ſeems, that an executor *de ſon tort* of an executor *de ſon tort*, is not liable for a *devaſtavit* committed by ſuch firſt executor, either at common law, or by either of the two laſt mentioned ſtatutes [u].

[u] Com. Dig. Admon. I. 3. Andr. 252. 3 Bac. Abr. 100. in not.

What has been ſtated in regard to actions againſt executors, is, in the main, applicable to adminiſtrators, whether general, or limited. If an adminiſtrator *durante minoritate* continue in the poſſeſſion of the effects after the executor is come of age, he may be ſued either by the executor, or by a creditor [c]. But, if ſuch adminiſtrator adminiſter in part, and deliver to the executor, on his coming of age, all the reſidue, he cannot be charged by a ſtranger [d]. If, before the executor attain the age of twenty-one, the adminiſtrator waſted the aſſets, he may be charged on the ſpecial matter by the executor [e]; but, ſubſequent to that period, he is not liable for the *devaſtavit* at the ſuit of a creditor. The creditor muſt reſort againſt the executor, who is entitled to his remedy againſt the adminiſtrator [f].

[c] Com. Dig. Admon. F. 1 Sid. 57. 1 Anders. 34.

[d] 1 Mod. 174, 175.

[e] Latch. 160.

[f] 3 Bac. Abr. 14. Latch. 267. 1 Anders. 34. 6 Co. 18. b.

By the ſtat. 8 *Ann. c.* 14. [g], a leſſor is empowered to diſtrain, within ſix calendar months after a leaſe for life, or for years, or at will, is determined, provided his own title or intereſt, as well as the tenant's poſſeſſion, continue at the time of the diſtreſs.

[g] Vid. Com. Dig. Diſtreſs, A. 2. 3 Bl. Com. 11.

In caſe a leſſee die before the expiration of a term, and his executor continue in poſſeſſion during the remainder and after the expiration of it, a diſtreſs may be taken for rent due for the whole term [h].

[h] Braithwaite v. Cookſey & al. 1 H. Bl. Rep. 465.

If

If an executor become bankrupt, his bankruptcy does not diveſt him of his legal right of executorſhip, nor does the commiſſioners aſſignment affect the aſſets, except in regard to ſuch beneficial intereſt, as the bankrupt himſelf may be entitled to. But, although a bankrupt executor may ſtrictly be the proper hand to receive the aſſets, yet, if his aſſignees be poſſeſſed of any part of the property, the court of chancery will, for the benefit of creditors and legatees, appoint a receiver for the ſame; or will direct the bankrupt himſelf to be admitted a creditor for what he ſhall be indebted to the eſtate; nor is this practice incongruous, as he acts in *auter droit:* But, to prevent embezzlement, the court, on ſuch proof, will order the dividends to be paid into the bank, ſubject to the demands on the teſtator's eſtate [i]. So, where A. a bankrupt, and alſo B. claimed to be executors of a creditor of A. and a ſuit was pending in the eccleſiaſtical court, in regard to the executorſhip; the Lord Chancellor permitted B. to prove the debt under the commiſſion, and directed the dividends to be paid into the bank, to abide the event of the litigation [k].

[i] Cooke's B.L. 133, 134, 135. 137. Stone 131. 1 Atk 101. 2 P. Wms. 546. 2 Bro. Ch. Rep. 596. Vid. alſo ſupr. 342.

[k] 3 Bro. Ch. Rep. 198.

SECT. IV.

Of remedies againſt executors, and adminiſtrators in equity.

AN executor or adminiſtrator is alſo, in his repreſentative character, liable to all equitable demands with regard to perſonal property, that exiſted againſt the deceaſed at the time of his death.

If, pending a ſuit, the defendant die, it ſhall be continued by bill of revivor againſt his executor [a].

[a] Mitf. 63, 64.

Legatees, or perſons in diſtribution, are alſo entitled to aſſert in a court of equity their claims againſt the executor or adminiſtrator, on the principle, that equity conſiders an executor as a truſtee for the legatee, in reſpect to his legacy, and as truſtee in certain caſes for the next of kin of the undiſpoſed ſurplus [b]. It alſo regards the adminiſtrator as truſtee for the parties in diſtribution [c]. And truſts are the peculiar objects of equitable cogniſance. Thus a bill lies for a perſonal legacy; or for a diſcovery, and an account of aſſets; or for the diſtribution of an inteſtate's perſonal eſtate [d]. So it lies for the diſcovery of aſſets, merely for the purpoſe of enabling the plaintiff to maintain an action at law againſt an executor [e], but not till he has denied aſſets by his plea to the action [f].

[b] 4 Bac. Abr. 447. 1 Atk. 491. 1 P. Wms. 544, 575. Prac. Reg. 2d edit. 209.

[c] 2 Fonbl. 322. 1 Vern. 133, 134. 2 Ch. Ca. 95. 2 Ventr. 362. 2 Ch. Rep. 167.

[d] 2 Fonbl. 321. not. (d). ibid. 322. Com. Dig. Chancery, (3 D. 1.)

[e] Com. Dig. Chancery, (2 G. 3.)

[f] Ibid. (3 B. 2.)

An

An executor may be alſo called upon in equity, to account for intereſt he has made of the teſtator's eſtate [s].

[s] 11 Vin. Abr. 433. in not.

And, although, the rule be not invariable, that an executor, in all caſes, ſhall pay intereſt for money employed in the courſe of his trade; yet if, without any reaſonable cauſe, he detain it for any length of time from the perſons entitled, and apply it to the purpoſes of his trade, or even ſuffer it to lie idle in his hands, he ſhall be ſubject to the payment of intereſt [t]. And if a will direct the executor to lend, at the beſt intereſt, a ſum of money, which, at the time of the teſtator's death, is outſtanding at four *per cent.*, and the executor ſuffer it to continue ſo, he ſhall be perſonally liable to pay five [u]. Nor, if an executor compound debts due from the teſtator, or buy them in for leſs than their amount, ſhall he be perſonally entitled to the benefit of the compoſition: but other creditors, or the legatees, or the party entitled to the ſurplus, ſhall have the advantage of it [w].

[t] 1 Bro. Ch. Rep. 359. 1 Veſ. jun. 294.

[u] 2 Bro. Ch. Rep. 429.

[w] 11 Vin. Abr. 433. 1 Salk. 155. pl. 4.

Yet, if an executor lend money on real ſecurity, which at that time there was no reaſon to ſuſpect, and afterwards ſuch ſecurity prove bad, he ſhall not be accountable for the loſs, any more than he would have been entitled to the produce of it, if it had been ſufficient [x]. So, where A, an executor, paid the aſſets into the hands of B., his co-executor, with whom the teſtator was uſed to keep caſh as his banker, on the failure of B. the court held,

[x] 1 P. Wms. 141. 4 Burn Eccl. L. 428. Supr. 340, 341.

held, that A. ought not to ſuffer for having truſted him, whom the teſtator truſted in his life-time, and at his death appointed one of his executors [y].

[y] 4 Burn. Eccl. L. 428.
[z] P. Wms. 243.

So, although, generally ſpeaking, if an executor compound or releaſe a debt due to the teſtator, he ſhall anſwer for the amount, ſtill, if he appear to have acted for the benefit of the eſtate, he ſhall not be charged [z].

[z] 11 Vin. Abr. 432. 3 P. Wms. 381. Vid. ſupr. 341.

Formerly an executor could not be compelled of courſe to ſecure a future legacy, on the principle that, where the teſtator had thought fit to repoſe a truſt, unleſs ſome breach of it were ſhewn, or a tendency to a breach, the court would continue to confide in the ſame hand; for ſuch a purpoſe it was neceſſary to ſhew miſconduct on the part of the executor, or his inſolvency [a]: or, in the caſe of an executrix, that ſhe had married a perſon in needy circumſtances [b]. But, according to the preſent practice, wherever a legacy is payable at a future period, the legatee, without any ſuggeſtion of an abuſe of the truſt, or that the fund is in danger, has a right to call upon the executor to have it divided from the bulk of the eſtate, and ſecured and appropriated for his benefit, as well where it is contingent, as where it is veſted [c]. Annuitants are likewiſe entitled to the ſame equity, and to compel the executor to ſet apart a ſufficient fund for the regular payment of their annuities [d].

[a] 3 P. Wms. 336 11 Vin. Abr. 426, 427. 428, 432. 3 Bac. Abr. 8. 1 Atk. 505. 3 Atk. 101.
[b] 2 Vern. 249.
[c] 4 Bac. Abr. 448. 1 Bro. Ch. Rep. 103. 2 Bro. Ch. Rep. 58. 2 Bro. 3 Bro. Ch. Rep. 365. Ambl. 273. Prac. Reg. 2d edit. 270.
[d] 3 P. Wms. 335.

If

If two executors or adminiſtrators join in a receipt, one only of whom receives the money, equity has been ſtated to adopt this diſtinction, that, in ſuch caſe, each is liable for the whole [c] as to creditors, who are entitled to the full benefit of law, although one of ſuch perſonal repreſentatives might have given an effectual diſcharge; but, that with reſpect to legatees, or parties claiming diſtribution, as they have no legal remedy, one executor or adminiſtrator ſhall not be charged merely by joining in the receipt, when the other has received the money: for the addition of his name is only matter of form, the ſubſtantial part is the act of receiving, and is alone regarded in conſcience [f]. But this diſtinction between legatees, or parties in diſtribution, and creditors, appears to reſt on no authority [g]. The rule is general, that executors, joining in a receipt, ſhall all be anſwerable [h]. It has, indeed, in ſome inſtances, been broken in upon [i], and the Maſter of the Rolls has denied it to be univerſally applicable [k]. It ſeems an exception, if an executor receive the money without the conſent of his co-executors, and they *afterwards* ſign the receipt [l].

[c] 3 Bac. Abr. 31.

[f] 1 Salk. 318. 1 P. Wms. 241. 1 Eq. Ca. Abr. 398. 2 Vern. 570.

[g] 2 Bro. Ch. Rep. 117. 1 P. Wms. 243. in not. 3 Bac. Abr. 31. in not.

[h] 1 P. Wms. 81. Prec. Ch. 173. 3 Atk. 584. Ambl. 219. 2 Bro. Ch. Rep. 116.

[i] 1 Salk. 318. 1 P. Wms. 241. 1 P. Wms. 83. not. (1).

[k] 3 Bro. Ch. Rep. 94.

[l] 1 P. Wms. 241. not. 1. 83. not. 1.

This, however, is clear, from all the caſes, that, where, by any act done by one executor, any part of the eſtate comes to the hands of his co-executor, the former will be anſwerable for the latter, in the ſame manner as he would have been for a ſtranger whom he had enabled to receive it [m].

[m] 1 P. Wms. 241. not. 1.

Yet,

Yet, a co-executor, who proved, but never acted, having received a bill by the poſt, on account of the eſtate, and tranſmitted it immediately to the acting executor, was held not to be reſponſible for the adminiſtration of the property [n].

[n] Balchen v. Scott, 2 Veſ. jun. 678.

Although one executor admit aſſets, an account ſhall be decreed againſt his co executor, who does not admit them [o].

[o] Com. Dig. Chancery, (2 G. 3.) 2 P. Wms. 145. 1 Bro. Ch. Rep. 488.

In caſe executors be decreed to pay intereſt on account of a breach of truſt, they are liable to coſts of courſe [p]. If the executors have acted fraudulently, the court will decree coſts againſt them, although the will direct, that their expences ſhall be allowed out of the teſtator's eſtate [q].

[p] Prac. Reg. 2d edit. 210. 1 Veſ. jun. 294.

[q] Prac. Reg. 2d edit. 150, 151. 2 Atk. 126.

But executors ſhall have their coſts, although they make a claim, and fail, if it were merely a ſubmiſſion of the point for the opinion of the court [r].

[r] Prac. Reg. 2d edit. 152. 1 Veſ. jun. 205.

SECT. V.

Of remedies againſt executors, and adminiſtrators in the eccleſiaſtical court.

LEGATEES and the next of kin may proceed againſt the executor or adminiſtrator in the eccleſiaſtical court. That court has not only juriſdiction

tion over the probate of wills, and the granting of administrations, but has also, as incident to the same, authority to enforce the payment of legacies[a], and, according to the statute, the distribution of an intestate's effects. In respect to legacies, the cognisance of them in former times belonged exclusively to that judicature. The court of chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees[b]. In regard also to distribution, equity, as the act of parliament contains no negative words, has a concurrent jurisdiction with the ordinary, and in both cases, as being armed with larger powers, affords a more effectual relief[c].

[a] 4 Bac. Abr. 436. 3 Bl. Com. 98.

[b] 5 Term Rep. 692.

[c] Vid. 2 Fonbl. 2d edit. 414. not. (d).

The spiritual jurisdiction extends to legacies only of personal property; therefore, if land is devised to be sold for the payment of legacies, they can be sued for only in a court of equity, because they arise out of the real estate[d]. So, it seems, that if a legatee take a bond from the executor for payment of the legacy, and afterwards sue him in the spiritual court for the same, a prohibition will be granted; for, by taking the obligation, the nature of the demand is changed, and becomes a debt recoverable in the temporal courts[e].

[d] 4 Bac. Abr. 446. Dyer 151. Palm. 120. Cro. Jac. 279. 364. Cro. Car. 16. 2 Roll. Abr. 285. 2 Show. 50.

[e] Yelv. 38. 2 Vern. 31. Sed Dodderidge J. contr. 2 Roll. Rep. 160.

As a court of equity and the spiritual court have in these points a concurrent jurisdiction, which ever of them has first possession of the cause, has a right to proceed[f]. But, where it appears, that the ordinary cannot administer complete justice, equity without

[f] 4 Bac. Abr. 447. Toth. 114. Prec. Ch. 548.

without regard to such priority will interpose. As, where a husband sues in the spiritual court for a legacy bequeathed to the wife, the court of chancery will grant an injunction to stay the proceedings, since the ecclesiastical judge has no authority to compel a settlement [g]. So, a legacy given to an infant is more properly cognizable in equity, since that jurisdiction can alone secure the money for the child's benefit [h].

[g] 2 Fonbl. 2d edit. 315. 1 Atk. 516. 2 Atk. 420. Prec. Chan. 548.

[h] 1 Vern. 26. 1 Atk. 491.

In case a legatee, or the next of kin, elect to sue in the spiritual court, the executor or administrator must there exhibit an inventory of the property, if he has not done so before, and bring in an account [i].

[i] 4 Burn Eccl. L. 425.

Of the nature of an inventory I have already treated [k]. It is to contain a full, true, and perfect schedule of the deceased's effects. The account is to state in what manner they have been disposed of [l].

[k] Vid. supr. 192. et seq.

[l] 3 Atk. 252.

Neither an executor nor an administrator can be cited by the ordinary *ex officio* to account [m]. The executor, we have seen, is bound by his oath to make an inventory of the personal estate, and exhibit the same into the registry of the spiritual court at the time assigned him for that purpose, and render a just account, when lawfully required, that is to say at the suit of a legatee; and in such case he is bound not only to produce an account, but also to prove the items of it [n].

[m] Com. Dig. Admon. C. 3. 1 Salk. 315, 316. 3 Atk. 253.

[n] 1 Salk. 316. Vid. also Cowp. 141.

The

The payment of ſums under forty ſhillings ſhall be proved merely by his oath, if there appear no fraud by dividing greater ſums into leſs. Of the payment of ſums to a higher amount vouchers muſt alſo be exhibited [n]. The adverſe party ſhall be at liberty to diſprove ſuch account. If it be falſe, the executor ſhall be liable to the penalties of perjury [o].

[n] 4 Burn Eccl. L. 427. Ought. 347, 348.

[o] 4 Burn Eccl. L. 427. Ought. 346.

After the death of an executor ſums under forty ſhillings ſhall not be allowed on the oath of his repreſentative; for ſuch payments can be ſubſtantiated only by him who made them [p].

[p] 4 Burn Eccl. L. 427. Ought. 347.

In regard to the adminiſtrator before the ſtatute of diſtributions, according to the condition of the adminiſtration bond, he alſo was bound to exhibit an inventory, and render an account when required. But, purſuant to that ſtatute, the adminiſtrator, we may remember, enters into a bond with two or more ſureties, conditioned for his exhibiting an inventory of the effects, and an account of the ſame, at the reſpective times ſpecified. Therefore, without citation or ſuit, he ought, in ſtrictneſs to appear on the day, and produce his account in court. But, in that caſe, it is neither verified by oath, nor liable to be examined. If, however, a party in diſtribution, who is in the nature of a legatee by ſtatute, and therefore entitled to an account, ſhall come in and controvert it; it muſt be ſworn to, and is ſubject to inveſtigation; when the proceedings ſhall be the ſame as in the caſe of an executor [q].

[q] 1 Salk. 315, 316.

[s] Vid. 4 Burn Eccl. L. 426.

Thus it appears, that the ſtat. 1 *Jac.* 2. *c.* 17. [s], which provides, that no adminiſtrator ſhall be cited according to the ſtatute of diſtributions to render an account of the perſonal eſtate of his inteſtate otherwiſe than by inventory, unleſs at the inſtance or proſecution of ſome perſon in behalf of a minor, or having a demand out of ſuch perſonal eſtate, as a creditor, or next of kin, nor be compellable to account before the ordinary; had, in truth, no operation, as ſuch was the law before [t].

[t] 1 Salk. 315, 316.

All the legatees, or parties in diſtribution, are to be cited to appear at the making of the account; for it ſhall not be concluſive on ſuch as ſhall be abſent, and have not been cited [u]. An executor or adminiſtrator, therefore, when he is called upon by any one party to account, ſhould cite the legatees, or next of kin in ſpecial, and all others in general, having, or pretending to have, an intereſt, to be preſent, if they think fit, at the paſſing of the ſame; and then, on their appearance, or contumacy in not appearing, the judge ſhall proceed [w].

[u] 4 Burn Eccl. L. 426. Swinb. p. 6. ſ. 20.

[w] 4 Burn Eccl. L. 426 Ought. 354, 355, 356.

[x] 4 Bac. Abr. 447. 1 Roll. Abr. 298, 299. Hob. 12. 12 Co. 65. Hetley, 87. 2 Inſt. 608. Sid. 161.

[y] Cro. Eliz. 88. 666. Show. 158. 173. Ventr. 291. 3 Mod. 283. 1 Ld. Raym. 220. 346 2 Ld. Raym. 1161. 1172. 1211. 2 Salk. 547. Carth. 142.

Although the ſpiritual court have, as incident to the juriſdiction of wills, the juriſdiction alſo of legacies; yet, if a temporal matter be pleaded in bar of an eccleſiaſtical claim, they muſt proceed according to the common law [x]. Therefore, if payment be pleaded in bar of a legacy, and there be but one witneſs, whom the eccleſiaſtical court will not admit, becauſe their law requires two witneſſes, a prohibition ſhall iſſue [y]. But, it is not a ſufficient

ground

ground for a prohibition to ſuggeſt, that the plaintiff had only one witneſs to prove the fact, unleſs the party allege he offered ſuch proof, and it was refuſed for inſufficiency [z].

[z] Carth. 143, 144.

After the inveſtigation of the account, if the ordinary find it true and perfect, he ſhall pronounce for its validity. And, in caſe all parties intereſted as above mentioned have been cited, ſuch ſentence ſhall be final, and the executor or adminiſtrator ſhall be ſubject to no farther ſuit [a].

[a] 4 Burn Eccl. L. 428 Swinb. p. 6. f. 21.

In caſe there ſhall appear aſſets for the entire, or partial payment of the legacy, or for a diſtribution, the ſame ſhall be decreed accordingly.

An executor or adminiſtrator is alſo bound to exhibit an account upon oath, at the promotion of a creditor; but a creditor is not permitted to call for vouchers, nor to offer any objections to the account; in reſpect to him the oath of the party is at once concluſive: For ſuch litigation would be altogether fruitleſs, ſince the ſpiritual court has no authority to award the payment of a debt [b].

[b] Vid. Noy 78.

The object of a creditor in ſuing for an account in the ſpiritual court is to gain ſome inſight into the ſtate of the fund, previouſly to his proceeding in an action at common law; but a bill in equity for a diſcovery of the aſſets is the more uſual, as it is the more effectual remedy [c].

[c] Vid. ſupr. 372. 377.

Yet,

Yet, a creditor, as well as the next of kin, has a right *ex debito juſtitiæ*, to an aſſignment by the ordinary of the adminiſtration bond, and to ſue in the name of the ordinary, as well the ſureties as the principal, ſhewing for breach the adminiſtrator's not exhibiting a true inventory, or account [d]. But a creditor has no right in ſuch caſe to aſſign for breach the nonpayment of his debt, or a *devaſtavit*; for the words of the condition, "he is well and truly to adminiſter," are conſtrued to apply merely to the bringing in of a true inventory and account, and not to the payment of the inteſtate's debts [e].

[d] 3 Atk. 248. Cowp. 140. Vid. 2 Fonbl. 414. 2d edit. not. (d).

[e] 4 Burn Eccl. L. 428. 430. Lutw. 882. 1 Salk. 315, 316. Com. Dig. Admon. C. 3.

An executor or adminiſtrator ſhall be allowed in the ſpiritual court all his reaſonable expences, the rule in reſpect to which is, that he ſhall receive no profit, nor incur any loſs [f]. A party having an intereſt, who prays an account, ſhall not be condemned in coſts, unleſs he make objections to it, which he fails to ſubſtantiate [g].

[f] 4 Burn Eccl. L. 428. Lind. 178.

[g] 4 Burn Eccl. L. 428. Floy 38.

A legacy may be recovered in the ſpiritual court againſt an executor of his own wrong [h].

[h] 4 Bac. Abr. 448. 1 Roll. Abr. 919.

Legatees may file a bill in chancery for an account againſt the executor, and, at the ſame time, call upon him in the prerogative court to exhibit an inventory [i].

[i] 11 Vin. Abr. 427. 3 Chan. Rep. 72.

THE END.

APPENDIX

OF

STAMP DUTIES.

APPENDIX

OF

STAMP DUTIES.

On PROBATES of WILLS or LETTERS of ADMINISTRATION.

	Assessments.		Total Duty.	Statutes.
Of any estate above 20l. and under 100l. value	- - -	0 5 0	0 10 0	5 & 6 W. & M. c. 21.
	Addl	0 5 0		9 & 10 W. 3. c. 25.
Of or above the value of 100l. and under 300l.	ditto	0 20 0	2 10 0	19 G. 3. c. 66.
	ditto	0 20 0		23 G. 3. c. 58.
Of or above the value of 300l. and under 600l.	- - -	0 5 0	8 0 0	5 & 6 W. & M. c. 21.
	Addl	0 5 0		9 & 10 W. 3. c. 25.
	ditto	0 20 0		19 G. 3. c. 66.
	ditto	0 20 0		
	ditto	0 20 0		23 G. 3. c. 58.
	ditto	0 20 0		29 G. 3. c. 51.
	ditto	2 10 0		37 G. 3. c. 90.
Of or above the value of 600l. and under 1,000l.	Addl	0 20 0	12 0 0	23 G. 3. c. 58.
	ditto	0 30 0		29 G. 3. c. 51.
	ditto	1 10 0		37 G. 3. c. 90.

On PROBATES of WILLS or LETTERS of ADMINISTRATION.

	Assessments.				Total Duty.			Statutes.
Of or above the value of 1,000l. and under 2,000l. - -	Add^{l}	0	20	0	20	0	0	23 G. 3. c. 58.
	ditto	2	10	0				29 G. 3. c. 51.
	ditto	2	10	0				35 G. 3. c. 30.
	ditto	2	0	0				37 G. 3. c. 90.
Of or above the value of 2,000l. and under 5,000l. - -	Add^{l}	3	10	0	30	0	0	29 G. 3. c. 51.
	ditto	2	10	0				35 G. 3. c. 30.
	ditto	4	0	0				37 G. 3. c. 90.
Of or above the value of 5,000l. and under 10,000l. - -	Add^{l}	5	0	0	45	0	0	29 G. 3. c. 51.
	ditto	5	0	0				35 G. 3. c. 30.
	ditto	5	0	0				37 G. 3. c. 90.
Of or above the value of 10,000l. and upwards *	Add^{l}	10	0	0	60	0	0	35 G. 3. c. 30.
	ditto	5	0	0				37 G. 3. c. 90

* By 23 Geo. 3. c. 58. and 37 G. 3. c. 90. Probates and letters of administration of common sailors or soldiers dying in his majesty's service are subjected to duty, but are specifically exempted by all other acts.

[*Heraud's Stamp Table*, 23, 24.]

On

On RECEIPTS for LEGACIES, or SHARES of PERSONAL ESTATE.

	Assessments.	Total Duty.	Statutes.
Given or passing to Wife, Children, or Grand-children, not exceeding the value of 20l. or under - -	Single o 2 6	o 2 6	20 G. 3. c. 28.
Of the value of 20l. and under 100l. - -	Single o 5 o	o 5 o	
Of 100l. or upwards -	Single o 20 o	1 0 0	
To all other persons, under 20l. - -	- - - o 2 6 Addl o 2 6	o 5 o	20 G. 3. c. 28. 23 G. 3. c. 58.
Of or above 20l. and under 100l. - -	- - - o 5 o Addl o 5 o	o 10 o	20 G. 3. c. 28. 23 G. 3. c. 58.
Of 100l. and - -	- - - o 20 o Addl o 20 o	2 0 0	20 G. 3. c. 28. 23 G. 3. c. 58.
every further 100l. to the amount of 300l. *each* 100l. and - -	Ad. 20s. p.cent.	1l. p.cent.	23 G. 3. c. 58.
the next 100l. to the amount of 400l. and -	ditto o 20 o	2 0 0	29 G. 3. c. 51.
every further 100l. over and above 400l. each 100l. - -	Ad. [20s./20s.] p.cent.	2l. p.cent.	29 G. 3. c. 51.

36 Geo. 3. c. 52. enacts, that *Legacies* left by persons who may have died *previous* to *April* 27th, 1796, should only remain subject to the preceding duties; FROM whence (inclusive) the *following* Duties should *commence*, and wholly exempts legacies bequeathed for the benefit of husband—wife—children, or grand-children, and the royal family; legacies of any description, UNDER 20l. and legacies out of personal estate, or clear residue thereof, the clear personal estate being under 100l. value.

On LEGACIES, or SHARES of PERSONAL ESTATE.

	Aſſeſſments.	Total Duty.	Statutes.
Legacy of 20l. or upwards given out of Perſonal Eſtate, and alſo upon the clear reſidue of Perſonal Eſtate, and every part thereof, whether accruing by virtue of a will or on an inteſtacy, and ſuch reſidue is of the value of 100l. or upwards)—given or paſſing to Brother or Siſter of the deceaſed or their Deſcendants—each 100l. greater or leſs ſum in proportion - -	Single 2l. p. cent.	2l. p. ct.	36 G. 3. c. 52.
Given to Uncle or Aunt or their Deſcendants *ex parte paternâ vel maternâ*	Single 3l. p. cent.	3l. p. ct.	
Great Uncle or Great Aunt or their Deſcendants *ex parte paternâ vel maternâ*	Single 4l. p. cent.	4l. p. ct.	
Any other degree of collateral Conſanguinity than above deſcribed, or any ſtranger in blood to the deceaſed * -	Single 6l. p. cent.	6l. p. ct.	

* LEGACIES of ANNUITIES of whatever deſcription, whether charged on perſonal or real eſtate, are liable to the ſame duties: ſuch *duties* to be paid at *four equal annual payments:* the *firſt* of which payments to be made on completing the payment of the firſt year's annuity, and the others in like manner ſucceſſively: *unleſs* the annuitant ſhall die in the interim of ſuch four years, *then* proportionably according to the number of payments made. THE VALUE of ſuch annuities to be calculated according to the tables in the ſchedule of the act 36 G. 3. c. 52. *Duty* on

LEGACIES

LEGACIES given to PURCHASE annuities, to be calculated on the ſums neceſſary to purchaſe them; and *duty* on LEGACIES the value of which can only be aſcertained by application of the allotted fund, to be *charged* on the *money* as applied: *duty* on legacies to be enjoyed by different perſons in ſucceſſion of the ſame degree of kindred, and chargeable with the ſame rate of duty, to be charged and paid as in the caſe of a legacy to one perſon; but if ſuch perſons are of different degrees of kindred, and chargeable with different rates of duty, then all perſons becoming entitled for life only, or other temporary intereſt, to be chargeable with the duty in the ſame manner as if bequeathed by way of annuity, and to be paid when they ſhall ſo reſpectively become entitled, by equal portions, during the aforeſaid term of four years; and any other partial intereſts to be charged in like manner.—Plate, furniture, or other things not yielding income, to be enjoyed in kind by different perſons in ſucceſſion, not to be chargeable while ſo enjoyed in kind with any duty, until in poſſeſſion of perſons having power to diſpoſe thereof. Duty on legacies enjoyed in ſucceſſion, to be charged as ſuch, whether taken under wills or by inteſtacy. Duty on legacies in joint tenancy, to be paid in proportion to the intereſt of the parties. Duty on legacies ſubject to contingencies, to be charged as for abſolute bequeſts (unleſs chargeable as annuities). Legacies ſubjected to power of appointment, to be charged with duty as property given to perſons in ſucceſſion, or abſolutely according to the conſtruction and limitations of ſuch power. Money, or perſonal eſtate, directed to purchaſe real eſtate, to be charged as perſonal eſtate until applied in manner before mentioned; but no duty to accrue after the ſame ſhall have been ſo applied. Eſtates *pur auter vie*, applicable as perſonal eſtates, to be charged as ſuch. Duty on property not reduced into money, to be charged agreeably to a valuation to be made by executors or adminiſtrators; but if the commiſſioners of ſtamps are diſſatisfied therewith, then they are themſelves to cauſe a valuation to be made, and then in caſe the ſame ſhall be objected to by executors, &c. an appeal to be made to the land tax commiſſioners, whoſe judgment ſhall be final—all expences to be borne by the miſtaken party. Money left to pay duty, not chargeable as a legacy. Duty on legacies not ſatisfied in money, to be paid according to the value of the ſatisfaction. But if at the end of *two years* it ſhall appear that it will be difficult to aſcertain the *reſidue* of the perſonal eſtate, the *duty may be compounded for*—with many other regulations and directions as by the act 36 G. 3. c. 52. PRINTED forms of *receipts* to be procured and duties paid at the *Legacy Receipt Office, Stamp Office, Somerſet Place*, or of or to any diſtributor of ſtamps in the country. DUTIES to be *accounted* for and *paid* by executors or adminiſtrators on retaining or paying legacies, and to be deducted and retained by them

out of ſuch legacies, and to be a debt from them to his majeſty: but executors *paying* legacies *without* deducting the duty, *both* legatee and executor accountable for the ſame. RECEIPTS to be *ſtamped* within twenty-one days after date, or within three months, on payment of duty and 10l. *per cent.* penalty. And a penalty of 10l. *per cent.* for paying or receiving legacies without ſtampt receipts—and neglecting to pay duty within fourteen days after the ſame ought to have been paid as aforeſaid, to forfeit treble the value of the duty. Penalty of 500l. for altering the receipts.

[*Heraud's Stamp Table*, 19, 20.]

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ERRATA.

Page 78. l. 19. *for* but; *read* yet.

171. to note [h], add. But now ſee ſtat. 5 Geo. 2. c. 30, § 25. in regard to contribution.

235. l. 4. after kingdom, *inſert*, to exerciſe or teach their trades abroad.

——— 5. after parts, *inſert*, ſhall not return into this realm within ſix months next after due warning given them.

THE END.

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